NATURAL LAW AND THE THEORY OF SOCIETY

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NATURAL LAW AND THE THEORY OF SOCIETY

1500 TO 1800

BY

OTTO GIERKE

With a Lecture on

The Ideas of Natural Law and Humanity

by ERNST TROELTSCH

TRANSLATED WITH AN INTRODUCTION

BY

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VOLUME I

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CONTENTS

VOLUME I

I

TRANSLATOR'S INTRODUCTION

II

III

IV

APPENDICES

VOLUME II

V

GIERKE'S NOTES

VI

LISTS OF AUTHORITIES

VII

INTRODUCTION

§ 1

THE TEXTS TRANSLATED

In 1900 Professor Maitland published, under the title of *Political Theories of the Middle Age*, a translation of one of the sections in the third volume of Dr Gierke's work on 'The German Law of Associations' (*Das deutsche Genossenschaftsrecht*), which had appeared, nearly twenty years before, in 1881. The present work, which deals with the political theories of the modern age, from 1500 to 1800, is a translation of five subsections in Gierke's fourth volume, which was published just twenty years ago, in 1913. In a chronological sense, it is a complement to Professor Maitland's work. In all other respects, it is a separate and independent book. It must be judged on its own account; and it cannot claim, in any way, to inherit the prestige or carry the authority which the weight of Professor Maitland's learning, and the arresting power of his style, have justly won for the *Political Theories of the Middle Age*, and especially for its Introduction.

The theme of the present volume is the natural-law theory of Society and the State. In other words, it deals with the views of the State, and of other groups (whether contained in the State, or parallel to it, or transcending it), which were professed in the School of Natural Law, or influenced by the ideas of that school, during the three centuries which lie between the Reformation and the French Revolution. But to elucidate fully the nature of the volume, some words must be said about its place in the history of Gierke's publications. In 1880 he published a work entitled *Johannes Althusius and the Development of Natural-Law Theories of the State*. This was, in a sense, a 'chip from his workshop' and a by-product of his prolific pen; but it was also a harbinger of the third and fourth volumes of his *Genossenschaftsrecht*.* Primarily intended to resuscitate a forgotten German thinker, it also made him a peg on which were hung both a history of the medieval theories which preceded his system of thought, and a survey of the modern theories which followed upon it.† In the next year, 1881, Gierke published

* The first volume had appeared in 1868, and the second in 1873.

† Gierke himself, in the preface to the second edition of his *Althusius* in 1902 (p 323), speaks of having 'appended a history of the evolution of natural-law theories of the State to an account of the life and teaching of Althusius'.

the third volume of the *Genossenschaftsrecht*, which dealt generally with 'the theory of State and Corporation in classical and medieval times', and in which a special section (the section translated by Maitland) was devoted to a more systematic account of medieval political theory than that already given in the book on Althusius Finally, in 1913, he published the fourth and last volume of his great work, dealing generally with 'the theory of State and Corporation in modern times', and largely devoted (the part here translated is nearly one half of the whole) to a revised and comprehensive exposition of the modern natural-law theories of Society and the State which he had already sketched in his work of 1880.*

Though it was only published in 1913, the last volume of the *Genossenschaftsrecht* had been written some twenty years before. The occasion of its publication was a reprint of the first three volumes, which decided Gierke to give to the world the manuscript of his fourth as it stood, in spite of the years which had accumulated upon it and the gaps which it contained. 'I do not believe', he pleaded, 'that any other writer will soon tread again the paths I have taken. They lead, in part at any rate, through utterly desert regions.' As it finally appeared, the new volume fell into two parts. The first described the history of modern social and political theory down to 1650: the second carried it forward from 1650 to 1800 What is here translated is the two concluding subsections of the first part, and the first three of the second. The concluding subsections of the first part treat of the influence of the growing natural-law theory of human society, as it developed during the century and a half of the period of the Reformation, from the Diet of Worms in 1521 to the Treaty of Westphalia in 1648. The first three subsections of the second part deal with the development of natural-law theory during the period of its ascendancy, from the accession of Louis XIV to the French Revolution, or (in other words) from Hobbes and Pufendorf to Kant and Fichte. The five subsections taken together, as Gierke says in his preface, 'form a whole'; and it is that whole which is presented here. There is one gap, for which Gierke expressed his sorrow, and for which the translator would venture to express his own regret. The natural-law theory of the relation of Church and State, which had been treated briefly but suggestively in its first phase, during the period of the Reformation, is not treated at all in its later phase, during

* An English translation of Gierke's book on Althusius is being undertaken by an American scholar, Dr Bernard Freyd.

the period between 1650 and 1800. The niche is there, as the reader will notice if he surveys the plan of the work; but it remains an empty niche. Otherwise the whole of which Gierke speaks is a rounded and finished whole, with a central theme developed in its various ramifications.

It is the value of this whole that it gives a connected and critical account of the general theory of human society—the theory of politics, of constitutional law, and of the law of associations—which was developed by the great school of Natural Law. That theory was a theory of the ideal or natural Law of human society, and of the ideal or natural Rights of man. It was a theory which culminated in the American Declaration of Independence in 1776 and the French Revolution of 1789. It was a theory adorned by many illustrious names—Hooker and Suarez, Althusius, Grotius and Pufendorf; Milton and Sidney, Hobbes, Locke and Rousseau; Spinoza and Leibniz; Thomasius and Wolff (less known in England, but none the less names of fame and power in the eighteenth century); Vico and Beccaria; Fichte and Kant. This is the theory which Gierke expounds, and these are the names with which he conjures. There are omissions in his work. The name of Hooker (though it recurs in the pages of Locke) is never mentioned by Gierke. He never refers to the name of Vattel, though his *Droit des Gens, ou Principes de la Loi naturelle*, of the year 1758, is still a text-book recommended for study in English Universities. He never touches on the efflorescence of natural-law ideas (partly promoted by the study of Vattel's book among the lawyers of Boston), which is so marked a feature of the American Revolution. Paine's *Rights of Man* is absent from his pages; and he never refers to the theory of Burke, or the criticism of Natural Law in the early writings of Bentham. As there are omissions, so there are also slips. The account which Gierke gives of the views of some of the many writers with whom he deals—Suarez, for example, or Spinoza, or even (on some points) Locke—occasionally stands in need of supplement or correction. On a journey of exploration so prolonged and so extensive it could hardly be otherwise.

But there are two things to be said on the other side, which make any slips or omissions fly up in the balance until they disappear from view. In the first place, Gierke has studied the original texts of a multitudinous literature—Catholic and Protestant, legal and political, German, French, English, Italian and Spanish; and the rich apparatus of his notes, with their abundant quotations of crucial

passages from his authorities, enables the reader to follow his sources and test his conclusions. In the second place, he has not sought simply to analyse and describe his material. Always concerned with the conception of the Group, and especially with that form of Group which he calls the Fellowship (*Genossenschaft*), and always anxious to discover the essence of group-life, the source and nature of group-authority, and the significance of group-personality, he has brought his own categories and problems to the study of his material; he has attempted to elicit its meaning in terms of these categories and in answer to these problems; and he has thus imprinted the form of his own scheme and system of thought upon the matter of his study. The danger of such a method is that it tends to make the theories of the past square with the demands of a particular system of the present The criticism in which it issues is external rather than immanent; and every writer, placed in a Procrustean frame, is adjusted to its plan and sized by its dimensions. But every age is apt to measure previous ages by its own ideas. Few of us apply 'the leaden standard of Lesbian architecture', which bends to its material,

> And alters when it alteration finds

We generally use fixed canons of judgment—be they those of Hegelianism, or Darwinism, or Marxism —according to our particular philosophy and our own *parti pris*. Gierke was in the tradition of Romanticism, of the Hegelian movement which fed on Romanticism, of the Historical School of Law (and particularly of the Germanist variety of that school) which drew upon both. He had also the foot-rules and set-squares of the German lawyer, he brought to his work conceptions of 'State-personality', of its *Trager* or bearer, of its 'organs', and of its (and their) capacity for being a 'Subject' or owner of rights. We have to remember, as we read his pages, the tradition he follows and the tools he uses. But the very fact that his tradition and his tools are different from our own adds a stimulus and a zest to the study of his writings. To see the development of western Europe during three centuries as Gierke saw it is to gain new angles of vision and new hooks of apprehension.

Many of the writers cited in these pages have long been buried in oblivion, at any rate for English readers. The dust is heavy on their forgotten tomes; and why (it may be asked) should it be disturbed? What are Bortius and Busius to us, or even Hertius and

Heineccius; and what are we to them? Perhaps we may answer the question, as John Morley once answered a similar question, by pleading that it is not only the great writers who have fertilised human thought; the multitudinous little leaves, which have seemed to flutter unregarded to the ground, have also played their part. But there is also a further answer. These writers were the exponents in their day, of the great idea of Natural Law; and it was their exposition which, directly or indirectly, fed the thought of Locke and Rousseau, and again of Fichte and Kant. We can hardly even understand Rousseau, the great populariser (as we may call him without offence) of natural-law speculation, until we get back to his sources He was not the inventor of the *personne morale*, or its *volonté générale*. They were as old as Pufendorf, and even older. 'Style is the man', and style is fame; but the scholar must go behind the stylist to those who dug the quarry, and hewed the stone, upon which the stylist drew. Even Kant and Fichte, who were thinkers rather than stylists, drew generously upon the great quarry of Natural Law for their ideas.

Many of these forgotten thinkers were in their day professors of law. Some of them professed law in the Dutch Universities of Franeker, Leiden and Utrecht; but most of them taught in the Universities of Germany. Althusius lectured at Herborn: Pufendorf at Heidelberg; and lawyers less famous lectured at Gottingen, Jena, Marburg and Tubingen. But conspicuous among all other Universities, in the study of law and politics, was the University of Halle, in Prussia, near the borders of Saxony. Founded in 1694, and rapidly becoming a centre of legal studies, it included among its teachers Thomasius and Heineccius, and (later in the eighteenth century) Wolff and Nettelbladt. The German writers whom Gierke cites are mostly professors of law, and many of them professors of law at Halle. They are worth remembering, if only because we may learn from them the contribution of German thought to political speculation in the seventeenth and eighteenth centuries —a contribution which was mainly made by the professors of the German Universities. But the matter goes deeper than that. These German professors not only contributed to the general development of European political thought: they also played a great and active part in the development of law, and we may almost say of the State, in Germany itself There were no Inns of Court in Germany to control the teaching of law and the development of the legal system. The Universities had a free course. In England

the teaching of law, in the Universities of Oxford and Cambridge (the only Universities down to 1832), was mainly confined to the lectures of the Regius Professors of Civil Law, who had been instituted by Henry VIII; and the Roman Law which they taught, however valuable it might be in itself, had little bearing on English life. It was far otherwise in Germany. Here there were chairs of every sort of law—Roman Law in its *usus modernus*, as it had developed since the 'Reception' at the beginning of the sixteenth century, Natural Law; International Law; Public Law. The professors covered a wide field, which ranged from the niceties of private law to the mysteries of public law and practical politics. They were springs of water in a thirsty land On the one hand, they could help to build a practical scheme of law There was no common law in Germany, or in any of its States, analogous to the Common Law of England, and not until 1791 did even Prussia acquire its *Allgemeines Preussisches Landrecht*. On the other hand they could furnish from their own ranks, or train among the ranks of their pupils, the judges, the statesmen, the officials and the ambassadors who were urgently needed by the German States The legal faculties of the Universities were the reservoirs of the German *Beamtentum* (one of the greatest creations of the German genius), in its highest and its widest sense We shall not do justice to some of the names which are mentioned in this volume unless we remember that they had this background Unknown to us in England, and perhaps lapsing into oblivion even in their own country, they yet laboured in the practical life of their day, and helped to determine its structure.* But, being professors, and therefore (according to the nature of that tribe) 'naturally speculative animals', they also laboured in the more austere fields of the pure theory of law and politics; and they have left abiding if musty monuments of their labours in those fields. They did the spade-work for the political theorist; and by their work on the theory of Natural Law, in particular, they released ideas which were to have a far greater practical effect, over a far greater area, than all their practical labours in their own immediate surroundings For those ideas were

* Even to-day, in the conditions of contemporary life, the professor of law plays a far greater part in the general life of continental countries than he is ever expected to do in England. We need only reflect on the labours of German professors in connection with the Civil Code or the Constitution of Weimar on the work of French professors in elucidating the Code of Napoleon, or on the position of the Italian professor of law in Italian jurisprudence and politics

to prove a dynamite which helped to explode the connection between Great Britain and her American colonies, and to shatter the ancient monarchy of France.

Of the connection of law with political theory, and of the special connection of Natural Law both with political theory and political practice, more must be said, in a more appropriate place, in a later section of this introduction. For the present it remains to explain the inclusion in this volume, by way of an appendix, of the translation of a lecture by Professor Troeltsch, delivered before the Hochschule fur Politik in Berlin, in 1922, on 'The Ideas of Natural Law and Humanity'. Like Gierke, but from the angle of the theologian and in terms of Christian thought, Troeltsch had worked his way through the centuries, exploring the historic systems of group-life, and the controlling ideas by which they were permeated, from the days of the early Church to the days of medieval Catholicism, and thence to the days of Protestantism and the various Protestant 'sects'. The result of his explorations appeared in a great work on *Die Soziallehren der christlichen Kirchen*, which was published in 1912, the year before the publication of the last volume of Gierke's *Genossenschaftsrecht*. The philosophies of human history and of human society which we find in Gierke and Troeltsch are in some respects parallel, and in some ways even complementary, to one another But Troeltsch was a younger man than Gierke (who was nearly 80 at the end of the War), and his thought was less fixed in worn and habitual channels. In 1922, at the age of 57, he set himself to reflect, under the impulse of German defeat, on the lines of German thought which had been current since the days of the Romantic Movement; to set them over against the natural-law lines of thought current in the more western countries of Europe; and to appreciate both lines of thought in terms of a general and catholic European outlook, inspired and deepened by a wide view of the history of European thought. The lecture in which he recorded his reflections is valuable in itself, and well worthy of translation for its own intrinsic contents. But that would not explain, or excuse, the inclusion of a translation of the lecture in this volume. It is included here because it contains a fundamental appreciation of the conception of Natural Law, with which Gierke was dealing: it is included because it contains a similar appreciation of the Romantic and 'Germanist' conceptions, in terms of which Gierke was thinking. It will help the reader in understanding both the

subject which Gierke approached, and the lines of his approach; and perhaps, if the reader will pardon a word of advice, the appendix may be worthy of his consultation before he turns to a study of the main contents of this volume.

The contrast drawn by Troeltsch between German thought and the thought of western Europe is a contrast which, as he himself remarks, can only be accepted with modifications and qualifications. Perhaps it needs still further qualifications than those which he has himself suggested. On the one hand the theory of Natural Law, during the period of its elaboration in the seventeenth and eighteenth centuries, was far from being confined to the countries of western Europe, or even from being particularly cultivated there: it was peculiarly developed, and peculiarly taught, in the Universities of Germany. On the other hand the deification of superpersonal Groups, and particularly of the State, which has been current in Germany since the Romantic Movement, is far from being confined to Germany. It has its analogies, if not its affiliations, in the doctrines of a school of French nationalism (the *action Française*), and in the philosophy of Fascist Italy, with its cult of the nation as 'an organism superior to the individuals, separate or grouped, of whom it is composed'.* But there is none the less a distinction between the thought of western Europe (and particularly of France) and the thought of Germany. Many of us have long been fascinated, and are fascinated still, by the profundity of German thought. But its solemn and high-piled clouds, great and gigantic, are not our natural sky. (Even the language in which it speaks is a language essentially different from ours. The vocabulary of the German thinker has a great and distant sonority: it speaks, as it were, with a sound of thunder; but what does the thunder actually say?. It is a question which a translator must often ask himself in perturbation of mind.) When we turn to the thought of France—formal as it may sometimes be, or even superficial—we turn to a clearer air; we converse with simple and classical ideas; we move among limpidity. German thought—like

* Carta di Lavoro of 1927, § 1. The French traditionalists and nationalists have equally repudiated the old French Republican creed of Natural Law and the rights of Humanity. 'Laissez ces grands mots de toujours et d'universel, et puisque vous êtes français préoccupez-vous d'agir selon l'intérêt français à cette date' (Barrès). 'Le pouvoir politique en France est contraint, sous les plus effroyables pénalités, de tenir pour étranger à l'humanité tout intérêt étranger à sa nation propre' (Maurras). Cited in R. Soltau, *French Political Thought in the Nineteenth Century*, c. xii.

the German nation itself, in the long travail of its development—is a heaving and tumultuous thing. When it becomes a thought about Groups and 'super-personal realities', it becomes (at any rate to the realist) a matter of billowy cloud and rolling nebulosities. We begin to see Groups as great Brocken-spectres, confronting us as we walk. Now we may admire the nation moving and heaving: we may admire the surge of its thought. we may admire the philosophy of super-personal Group-persons—the Folk: the Fellowship: the *Verband* in all its forms. It is, indeed, a philosophy which can ennoble the individual, and lift him above self-centred concern in his own immediate life But it may also be a philosophy which engulfs his life, and absorbs his individuality; and it may end, in practice, in little more than the brute and instinctive automatism of the hive. We have to admit, after all, the justice of Troeltsch's saying, that the end of the idealisation of Groups may be 'to brutalise romance, and to romanticise cynicism' We have to confess that the cult of super-personal Beings has had some tragic results. It began with Herder's Folk-poetry and Folk-music; it grew into Hegel's Folk-mind and Savigny's Folk-right (the right or law which is just a particular people's sense of justice in its own particular phase of development): it culminated in Scharnhorst's Folk-army While it has grandeur and flame, it has also a cloud of smoke Individualism is often used as a word of reproach; but it is good to see simple shapes of 'men as trees, walking', and to think in simple terms of human persons Persons—individual persons—have a finitude or limit which can satisfy our intelligence, and an infinity or extension which can satisfy our faith They have finitude or limit in the sense that, in any and every scheme of social order, each of them occupies a definite position, with its definite sphere of rights and duties, under the system of law which necessarily regulates their external relations with one another They have infinity or extension in the sense that, *sub specie aeternitatis*, each of them is 'a living soul' (as nothing but the individual person is or can be), with an inner spring of spiritual life which rises beyond our knowledge and ends beyond our ken. If we look at Groups from this angle, we shall not call them persons We shall call them organisations of persons, or schemes of personal relations, in all their successive phases, from the village or club to the State or the League of Nations. And because they are organisations or schemes, made by the mind of man, we shall regard them as constructed by the thought of persons, consisting in the thought of persons,

sustained by the thought of persons, and revised (or even destroyed) by the thought of persons—but never as persons themselves, in the sense in which individuals are persons.

§ 2

LAW AND POLITICAL THEORY

We have already spoken, incidentally, of the connection between the study of law and the study of social and political theory The method, and the substance, of Gierke's writings must naturally impel us to some further consideration of the nature of that connection. He was himself a lawyer, and a lawyer in a double sense. Not only was he a lawyer of the chair, immersed in the study and exposition of legal history and legal principles, he was also a lawyer of the battle-field, who plunged into the busy war of ideas which attended the construction of the German Civil Code in the latter years of the nineteenth century. The two sides of his activity were closely connected. He explains himself, in the preface to the last volume of his *Genossenschaftsrecht*, that if he had turned aside from history into contemporary struggles, it was in the same faith, and with the same object, that he had written history—'to penetrate the new code with a Germanistic spirit; to develop its Germanic content upon an historical basis; to foster the growth of its Germanism in the future'. We must remember, as we read his writings, that he is bringing a view of the German State and of German society, derived from his long studies, not only to interpret their development in the past, but also to shape their development in the present, during the great years of political and legal construction that lie between the new constitution of 1871 and the new Civil Code of 1898. It is in this spirit that he approaches the theory of State and Society in the period from 1500 to 1800, when the idea of a universal Natural Law was in the air. What was there of truth in those three centuries, which accorded with the long historic trend of German life and thought and could be incorporated into the German present? What was there of error, which must be banished? Some truth there was; and the passage from Gierke's work on Althusius, translated in Appendix II, will show how strongly he felt the value of the fundamental idea of Natural Law—the idea that there is a natural justice, based on the reason of man, which lies behind all positive law. But there was also some-

thing of error; and the reader of this volume will see, from Gierke's criticism of the individualistic basis of Natural Law, how strongly he felt that error, and how deeply concerned he was to urge his own philosophy, that the world is a world of 'real Group-beings' as well as of individuals.

The connection between law and political science is far closer on the Continent than it is in England. With us, the subjects have generally tended towards a divorce; and there has been little study of political science in terms of law. Hobbes was not ignorant of English law; but he used the language of physics and behaviouristic psychology rather than the language of law. Locke employed the conception of 'trust'; but he was a physician, a philosopher and a politician rather than a lawyer. Few of our lawyers have turned their attention to the fundamental questions of politics. We may count the names of Blackstone and Bentham, Austin and Maine, Dicey and Maitland; but they are scattered lights rather than a constellation, and the light of Blackstone is somewhat dim. On the whole our law has been a close and empirical preserve of the legal profession; and our political science has proceeded not from lawyers or professors of law, but from politicians with a philosophic gift or philosophers with a practical interest. We have gained something from our defect—if indeed it is a defect. The politician with a philosophic gift—be it Sidney or Burke, Morley or Bryce—can bring a bracing sense of reality to his speculations. The philosopher with a practical interest—Adam Smith and Paley in the eighteenth century; Sidgwick, T. H. Green and Bosanquet in the nineteenth—can carry practical questions into the high and ultimate regions of ethical principle. The English system of political science, so far as we can speak of such a thing, has combined an instinct for actual fact with some sense of the moral foundations on which the action of States, like all human action, must necessarily be based. The tradition of humanism in our Universities—the tradition which carried back teacher and taught to the writings of Plato and Aristotle, and imbued not only the master, but also the pupil destined for political affairs, with the ethico-political ideas of the *Republic* and the *Politics*—corroborated a native sense of the moral foundations of politics. Our political science acquired what a German scholar might call a 'normative' character. A study of politics which is primarily legal may become a desiccated study of *Staatsrecht*, and revolve about questions of legal metaphysics such as the nature of 'State-personality' or the essence of 'State-

sovereignty'. Our English political philosophy has been sporadic; it has hardly developed any 'school', unless we can call Benthamism a school; but it has generally been occupied in discussing the moral norms or standards by which the State and its activities should be controlled. Perhaps we shall not be over-kind to it if we see it in our mind's eye, as Aristotle saw Socrates, περὶ τὰ ἠθικὰ πραγματευόμενος.

On the Continent—if we may draw a rough and crude contrast, which needs many qualifications—political education and political speculation have generally gone along the lines of law. Law has been the preparation for the service of the State, in its administrative as well as its judicial activities; and law has been the basis of the theory of the State. On the one hand, it has provided the training of the *Staatsbeamtentum*: on the other hand it has provided the concepts and the line of approach for *Staatswissenschaft*. '*Summa legalitas*', we may almost say, 'the lawyer is ubiquitous' Certainly the political theory of France and Germany bears his mark. To study modern French political theory is to study the lawyers—Esmein, Hauriou, Barthélemy, Duguit it is to study works which generally go by the style of *Traité du Droit constitutionnel* To study modern German political theory is equally to study the lawyers—Jellinek, Kelsen and Schmitt, and if treatises are written on the theory of the State (*allgemeine Staatslehre*), as well as on *Staatsrecht* proper, we find they are written by professors of law. We are face to face with a great and general trend; and we are bound to examine its significance, and to see whether it may not have lessons to teach us Our English political science has hitherto had no great method; and we may, at the very least, learn some lessons in that respect.

Now it may be true that the legal approach to political science tends to lead us into apparently arid regions of legal metaphysics. It may also be true that such an approach tends to convert the State into a legal institution, rather than 'a fellowship in the good life'. But there are other things which are also true. In the first place the State is so much identified with law, in all its daily operations (which are operations of declaring and sanctioning law, and thereby declaring and sanctioning the rights of all its members), that we are bound to study law if we wish to study the State. In the second place, the study of the State in terms of law makes political science a genuine discipline, and demands from the student a genuine grasp of legal conceptions and the general legal

point of view. Political science which is not rooted and grounded in some such discipline becomes a loose congeries of facile *aperçus*. In the third place, the whole vocabulary of political science is steeped in terms of law; and this etymological fact is the reflection and the expression of a long historical process. Throughout the centuries political science has been borrowing the conceptions of law; and it is in the language of law that it has learned to speak and to utter articulate words.

It has been said that 'the world which derives its civilisation from western Europe may be divided into the lands of the English law, and lands where in outward form at least the law is Roman'.* Political science, for reasons to which we have already referred, is no great debtor to the vocabulary of English law. But it stands deeply indebted to the law of Rome. When men tried to interpret the State as a 'society', they were borrowing the term *societas* from Roman private law. When they tried to interpret government as the exercise of an authority which had been delegated by the 'society', they were borrowing the conception of *mandatum* from the same source. These were matters of the borrowing of private-law terms and conceptions and their application to the sphere of public law. In other words, what was involved was the use of the rules of law relating to private groups and private activities in the State to explain the character and the activity of the State itself. Difficulties naturally arose, as Gierke sufficiently indicates, from this transference of the ideas of one sphere to explain the life of another. But Roman law could supply the political theorist with something more than private-law notions. It had conceptions of the nature of *jus* and *lex*, and of the part played by the People in the making of *leges*: it had conceptions of *imperium* and *majestas*. It had the conception of the *Lex regia*, by which the People transferred *imperium* and *potestas* to the Prince. All these conceptions became the stuff of political theory; and they were developed in the steady and continuous work of the commentators on Roman law during the Middle Ages. We study the ideas of Dante and Marsilio of Padua; but we have to remember that by their side stood their contemporary, the great legist Bartolus of Sassoferrato, and that the ideas of Bartolus, themselves derived from the old Roman heritage, became in turn the heritage of the sixteenth century, and are quoted and used by most of its writers on politics.

* Professor Geldart, in *The Unity of Western Civilisation* (edited by F. S. Marvin), p. 133.

There were other heritages besides the legal heritage of Rome which lay at the disposal of the political theorist. There was the heritage of Aristotle, received in the thirteenth century; there was the heritage of the Christian Fathers, and not least of St Augustine, which had been continuously cherished by the Church. But Roman law had a special volume and importance. It was more than a heritage; it was a living body of actual law, practised in courts and developed by jurists. It was a consistent body of vital ideas, which could not only be used by the theorist, but was also affecting political life and development. Its history during the Middle Ages, as Vinogradoff writes at the end of his *Roman Law in Mediæval Europe*, 'testifies to the latent vigour and organising power of *ideas*, in the midst of shifting surroundings'. It is little wonder that the political theory of modern Europe, when it emerges in the sixteenth century, is largely expounded by lawyers, and expounded in terms of Roman law. Bodin, Althusius, Grotius, Pufendorf are the typical figures; and they are all lawyers. True, there are the clergy, concerned to find a theory of the Church and its relations to the State; but even the clergy largely follow the fashion of law (have they not their own Canon Law?), and the great work of Suarez is entitled *Tractatus de legibus ac Deo legislatore*. True, there are the philosophers, concerned to find the eternal principles of politics; but they too generally betake themselves to law. Fichte writes a *Grundlage des Naturrechts* and a *System der Rechtslehre*; Hegel himself writes a work entitled *Philosophy of Law and Outlines of the State.*

Political science has thus for many centuries largely spoken the language of law, and mainly of Roman law. (Natural Law, as we shall presently see, is the term which theorists often used to grace their measure; but Natural Law, as we shall also see, is itself a conception of the Roman lawyers.) But what, we may ask, is the conception which we may properly form to-day, in our present state of experience and opinion, about the relation between political science and law? We may begin our enquiry by drawing a distinction between Society and the State. Society, or community, which in our modern life takes the form of national society or community, is a naturally given fact of historical experience. Each national society is a unity; and each expresses its unity in a common way of looking at life in the light of a common tradition, and in the development of a common culture, or way of life,

in all its various forms. But each society is also a plurality. It is a rich web of contained groups—religious and educational; professional and occupational; some for pleasure and some for profit; some based on neighbourhood and some on some other affinity; all dyed by the national colour, and yet all (or most of them) with the capacity, and the instinct, for associating themselves with similar groups in other national societies, and thus entering into some form of international connection. Such is society, at once one and many, but always, in itself, the play of a voluntary life and the operation of the voluntary activity of man. This is the material on which there is stamped the form of the State. The State, we may say, is a national society which has turned itself into a legal association, or a juridical organisation, by virtue of a legal act and deed called a constitution, which is henceforth the norm and standard (and therefore the 'Sovereign') of such association or organisation. This constitution need not be a single document: it may be a set of historical documents; and over and above that it may also be a set of unwritten constitutional conventions, backing and reinforcing whatever documents there be. Constituted by and under this constitution, and thus created by a legal act (or series of acts), the State exists to perform the legal or juridical purpose for which it was constituted. It declares and enforces, subject to the primary rule of the constitution, a body of secondary rules, or system of ordinary law, which regulates the relations of its members as 'legal persons' (a term to which we must recur in a later section), and assigns these 'persons' the rights and duties which form their 'legal personality'. It creates a scheme of working relations, in such areas of life as are susceptible of uniform and compulsory regulation, and it calls this scheme by the name of law: it creates a position for each member under the scheme, and it calls that position by the name of rights and duties. Law is the method of its operation. the rights and duties of 'persons' (which, as we shall see later, may be individuals or groups) are the objects of its operation. But though the State, and with it law, and with law the compulsory regulation of human relations in certain areas, has supervened, as it were, upon Society, Society still remains. If Society has turned itself into a legal association, it has not turned the whole of itself into that form; nor has it perished in producing the State. It still remains, with its common way of looking at life, engaged in the development of its common culture: it still includes its rich web of groups, which may still pursue their voluntary activities in the social

area not regulated by law. Behind the organised legal State there runs the life of national society; and there is thus a rich country stretching outside the four walls of State-regulated life.

Before we seek to study the relation between law and political theory on the basis of these ideas, we may pause to enquire, for a moment, into Gierke's own conception of the relation between Society and the State. *Gesellschaft*, in his vocabulary, is the sum total of human groupings, and the general and comprehensive expression of human associations. It ranges from the universal society of all humanity down to the village and the family in the village. From this point of view the State is one of the forms of *Gesellschaft*; and you may thus have a general theory of *Gesellschaft* which colours and determines your view of the State. So far as this goes, the State is just a circle in a series of concentric circles. But Gierke seems also to have another point of view; and this point of view appears to be dominant. From this point of view, the State shifts into the centre. All other groups are arranged according to the relation in which they stand to it. There are some groups which are *in* the State; there are others which are *side by side* with it (the Church being the only example): there are others (such as federations and the general international society of States) which are *above* it—though it is not made very clear whether this means simply that they are larger, or whether it means that they are superior. So far as this goes, the State seems to hold the interior lines. But there is still another point of view which also has to be taken into account. We have to remember Gierke's fundamental belief in the reality of the Group-person * On this basis the State becomes a real person; but so also do those groups in the State which are more than mere partnerships or simple collections of individual persons; and so, again, does the Church, as a group which stands side by side with the State. One real Group-person may somehow be greater and more authoritative than another; but so far as they are all 'real', they all seem to be on a level. It is hardly clear how Gierke really conceives the relation of State and Society. But on the whole he seems to regard the State as a force controlling and regulating society and its various groups; and he is anxious that it should do its shaping liberally, recognising, in its regulation of groups, that it is regulating 'real persons'.

Returning from this digression, and adopting, for the purposes of our argument, the distinction between State and Society which

* *Der Zentralgedanke der realen Gesammtpersonlichkeit*, preface to vol IV, p. XI.

was suggested before we digressed, we may now examine the proper scope of political theory, and the nature of its relation to law. Political theory, we may begin by observing, is not concerned with the State alone. It is also concerned with Society, because it is impossible to understand the State unless we see it in connection with the Society from which it proceeds, upon which it reacts, and which reacts upon it. The word 'political', if by it we only mean the adjective of the noun 'State', is not broad enough for our purposes; and from this point of view we might more properly, if also more cumbrously, prefer to speak of 'social and political theory'. But we need not quarrel about adjectives; and we may content ourselves with the traditional term 'political theory' (or 'political science', though the word 'science' seems to make a large claim for any study of things human), provided it be understood that we are not obliged to study the State alone, or to study it in isolation. So conceived, political theory will deal with three main matters. It will deal with the nature of Society and the process of its activity It will deal with the nature of the State, as a legal association, and with the whole process and intention of its legal activity. It will deal with the relation of Society to the State, and of the State to Society.

In dealing with the second of these matters, political theory will largely be using legal material, and it will make itself largely the debtor of law. It will study public or constitutional law, seeking to understand and to interpret the 'frame of government' which the constitution prescribes, and also (if there be any 'declaration of rights') the general system of rights, and the general system of duties, which it declares. It will also study what may be called social law, or the law of associations, seeking to understand and to interpret the principles on which the State deals with groups. It will even study the private law which deals with individuals; for the action of the legal association will not be clear unless we know something of the concrete rights and duties which express and fix the position of its members and determine the nature of their relations with one another. But in dealing with this legal material, the political theorist will often be forced to transcend its purely legal aspect In dealing with the public institutions of the State, for example, he has not only to see them as they legally are: he has also to see them as they actually work. A scheme of representative institutions prescribed in a constitution is one thing: the actual working of such a system, under the influence of party organisa-

tions and other factors, may be quite another. Society and social forces are always making their impact on the legal State and its legal factors and instruments. The influence of party organisations (which strictly speaking are social formations in the area of Society, rather than legal institutions in the area of the State) is an example of such impact. Political theory, even in the act of studying the State, is bound to turn its attention outside the State to the Society which lies behind it and is always acting upon it. It cannot long study the second of the three main matters mentioned above before it finds itself driven back to the first, and forward into the third.

Here, in some measure, the political theorist finds himself compelled to go beyond the lawyer—though the lawyer who seeks to expound a 'philosophy of law' (Professor Pound, for example)* will not readily be outdistanced, and will march by his side with equal steps. (After all, there is little difference between a 'philosophy of law' and a 'philosophical theory of the State'.) But there is also another way in which the political theorist has to go beyond the lawyer—unless, again, the lawyer be also a legal philosopher. It is not enough for him to consider the actual form and operation of State and Society. He has to consider the ends or purposes by which they should ideally be controlled. He is not only concerned with what legally is and what actually works: he is also concerned with what should ideally be. Here he has to move into the kingdom of ultimate ends If, like Aristotle, we believe that ethics is the study *par excellence* of the purposive activities of man and the ends by which they are guided, and if we accordingly hold that ethics has an 'architectonic' quality, we shall say that the political theorist must betake himself ultimately to the moralist. He must find the touchstone of social life and political activity in some ultimate ethical principle. To many that ultimate principle has always seemed to be the intrinsic value of the human personality; and men have been fain to believe that the State and its law were instruments for serving the conditions of the free emergence and free development of that ultimate and intrinsic value. *Autres temps, autres mœurs.* Ethics seems to be dethroned; and the emergence of the free human personality, described as being merely 'the maximum of free individual self-assertion', has been rejected as an idea appropriate to 'the age of expansion' from the sixteenth to the nineteenth century, but inappropriate to our own. Economics reigns, having driven out ethics; and notions of 'solidarity' or

* *Introduction to the Philosophy of Law.*

'social utility' have expelled, or are seeking to expel, the old notion of the intrinsic value of the human personality. To Duguit, the ultimate source of *la règle du droit* is the economic fact of solidarity, which is so ultimate, and so overwhelming, that the standard of social and political life may be expressed in the one principle, 'Do nothing contrary to social solidarity, and co-operate, as far as possible, in its realisation'. To Professor Pound, the ultimate end of law (and therefore of the State, as a legal association) is to be found in social utility. Law exists to provide 'a maximum satisfaction of wants'—these wants being understood in the sense of 'social wants' which are felt by different social sections and interests. It seeks to strike some sort of balance between their conflicting claims and demands; it serves as a sort of social engineering, 'giving effect to as much as we may with the least sacrifice', so far as such effect can be given 'by an ordering of human conduct through politically organised society'.*

It is not necessary for us to seek to appreciate, or to criticise, these different conceptions of the ultimate end of social life and political organisation Gierke himself, in the general remarks on law which are translated in Appendix II, has said some words on the matter which are well worthy of consideration. It is sufficient for our purposes if we recognise that political theory must necessarily culminate in a study of ultimate ends, in whatever way it may seek to conceive the nature of those ends. We may now resume, in two propositions, the conclusions to which we have been led by our argument in regard to the relations between law and political theory. In the first place political theory, while it is concerned with Society as well as the State, and while it has to study the interaction between the two, is specifically concerned with the State; and here—just because the State, as such, is a legal association—it must borrow its material largely from law (public, social and private), though it is bound to study the actual working as well as the legal forms of such material. (Political theory which is concentrated exclusively on legal form becomes merely a matter of *droit constitutionnel*. political theory which is concentrated entirely on the actual working of institutions becomes merely descriptive politics, and the description given, if it loses hold of the firm ground of legal rule, may also become tendencious and partisan.) In the second place, political theory must ultimately rise into a philo-

* Op. cit. c. 2, on 'The End of Law', especially the conclusion of the chapter

sophy of political values and a doctrine of the ultimate ends of organised society. It must, in a word, assume a normative character, whether it finds its norms in pure ethics, or in some more or less economic theory of social solidarity or social utility. Here the philosophy of law may join hands with political philosophy; and though the legal philosopher will talk of the ends of law, and the political philosopher will speak of the ends of the State, there will be little difference between them. For the State is essentially law, and law is the essence of the State. The State is essentially law in the sense that it exists in order to secure a right order of relations between its members, expressed in the form of declared and enforced rules. Law, as a system of declared and enforced rules, is the essence of the State in the same sort of sense as his words and acts are the essence of a man.

When we come to consider Natural Law, we shall see how much a philosophy of law (for Natural Law, in a sense, is simply a philosophy of law) can contribute to political theory—how much, indeed, it *is* a political theory. For the present it only remains, in conclusion of the present argument, to consider briefly some other ways of approach to political theory, besides the way of law. There are two such ways to which Gierke alludes in the course of his writings. One we may call the biological, and the other the psychological. It is the biological way of approach which seems particularly to have attracted Gierke, as it has also attracted many other writers since the middle of the nineteenth century.

We may consider the biological approach to social and political theory from two different points of view. From one point of view we may say that Society and the State, whatever they are in themselves, have a biological basis This is obviously true. Every national Society, and every State, has the biological basis both of the physical breed or stock of its members, and also of the physical characteristics and influences of its territory. This basis will necessarily react upon that which is built upon it; and to understand fully any particular State or Society we must therefore study this basis. But there is also another point of view, which is very different. From this point of view it may be contended, and it has often been contended, that Society and the State are themselves of the nature of biological structures, or organisms, in the sense that they are so analogous to such structures that they must be interpreted in the same terms and by the same language. This is a point of view

which is not so obviously true. But it recurs in the writings of Gierke, and it is particularly developed and pressed in a rectorial address which he delivered in 1902 on 'The Nature of Human Groups' (*Das Wesen der menschlichen Verbande*). It is a point of view which would make both law and political science indebted to biology for the conceptions which they use to interpret their material, and the language which they employ to express their conceptions.

How far can we accept such a point of view? We may admit that the analogy between the physical body and the body politic is one which has long been employed. We may also admit that it was natural, and indeed inevitable, that the new growth of biological science in the nineteenth century, which threw a flood of light on the development and the nature of the physical organism, should have resulted in a vastly extended use of the old analogy. Finally, we may admit that Gierke was under a particular temptation to press the analogy He was arguing that groups were real persons—real 'unitary' persons, existing over and above the multiple individual persons of which they were composed. It seemed a corroboration of the argument to add that they were also real bodies or organisms—or rather, that they were so analogous to real bodies or organisms that they must necessarily be described in terms drawn from such bodies But what seems to be a corroboration may really be a confusion; and Gierke, like other thinkers who have pressed the organic analogy, has not entirely escaped this risk. It is one thing to predicate of a group that it possesses personality This is to say that it is a spiritual existence, and possesses a spiritual attribute It is another thing to predicate of a group that it is an organism, and possesses an organic character. This is to say that it is a physical existence, and possesses physical attributes Gierke is really aware of the difference between these two things He is convinced that the group really and truly *is* a person. He is *not* convinced that it is an organism, but only that it is like an organism—like, and yet (he confesses) unlike.* But while he can make

* 'Properly understood, the analogy only suggests that we find in the social body a unity of life, belonging to a whole composed of different parts, such as otherwise we can only perceive in natural organisms We do not forget that the inner structure of a Whole whose parts are men must be of a character for which the natural Whole affords no analogy, that here there is a spiritual connection, which is created and developed, actuated and dissolved, by action that proceeds from psychological motives: that here the realm of natural science ends, and the realm of the science of mind begins' *Das Wesen der menschlichen Verbande*, pp. 15, 16.

this distinction, he can also let it disappear; and sometimes he lets it disappear altogether. When he writes that there is a 'scientific justification for the assumption of a real *corporeal* and spiritual unity in human groups',* he has let the group-personality take to itself the flesh of a group-organism, and he has forgotten his own warning. An analogy which is consistent with differences has dropped the differences; and ceasing to be an analogy, it has become an identity. It is well to insist that biology only furnishes law and political science with an analogy. So does engineering; so does chemistry, and so may any science. The biological analogy may be the best of the various analogies; and indeed we may frankly confess that it is. But we may also confess that 'organism' is itself an analogy drawn from mechanism; for 'organ' means a tool or instrument, and when we speak of 'organs' of the body we are using an engineering analogy The 'social organism' is an analogy which is based upon an analogy; and if biology can supply political science with a good metaphor for the understanding of the nature of Society and the State, it has itself been supplied already with a good metaphor in advance

The psychological approach to political theory is more direct, and issues in a closer contact, than the biological. Psychology is a science of the mind; and it has a natural relation to studies such as political theory which deal with the social products and creations of the mind. The psychologist who seeks to elucidate 'human nature in politics' (or, more exactly, to explain the processes and operation of the human mind in its political activities) can bring a point of view which supplements, and may correct, the findings of the older style of political theory. Such theory has tended to speak, in intellectual terms, of the rational apprehension and conscious volition of purposes. Psychology can take us into the dim country which lies behind the conscious intellect—the country of emotions and instincts in which there rise so many of the springs that run through social life This is a contribution of clear and definite value. But there is also another contribution which psychology has sought to make to political theory. Not only has it emphasised the subconscious factors of the individual mind which play their part in politics: it has also sought to discover the existence, and to explain the nature, of a supposed group-mind, with group-emotions, group-instincts, and even a group-intellect. We

* Ibid. p. 23.

might have expected that this form of psychological theory would have attracted Gierke. His own language is language of the group-person and the group-will; and this, at first sight, seems cognate to the psychological theory of the group-mind. Why should he not have used that theory, and used it in preference to the biological analogy of the organism on which he lays so much emphasis?

In one or two passages of his lecture on 'The Nature of Human Groups', Gierke refers to psychological theory. He speaks of a *Volksseele*: he mentions, as parallel to his own 'organic' theory of the group, the speculations of Wundt and the development of *Volkerpsychologie* But on the whole he makes little use of the material or the theories of the psychologist. Two reasons may be suggested In the first place, the group which he has in mind, with its group-personality and its group-will, is not a psychological tissue, connecting the threads of individual minds: it is a sort of higher reality, of a transcendental order, which stands out as something distinct from, and something superior to, the separate reality of the individual. Gierke borrows from Hegelian philosophy rather than from group-psychology; and when he writes that 'human group-life is a life of a higher order, in which the individual life is incorporated',* he is in a different world of ideas from the psychologist—a Hegelian world of graded manifestations of the eternal mind. a world of values, higher and lower, which does not come within the ken of the psychologist, who simply deals with the actuality (or the supposed actuality) of mental units and processes. In the second place, the psychological theory of the group-mind was largely elaborated after Gierke had formed his theory, and it is mainly a French theory. It is the theory of M. Durkheim and M Le Bon, but especially of the former, with his view of the social mind as the one real mind, which thinks in and through the physical brains of individuals, but only uses them as its tools. This later theory, cultivated in France and exported to England and America in the beginning of the twentieth century, lay outside Gierke's range of interest and knowledge. But even if it had come within his range, it could hardly have affected his thought. The 'group-beings' among which he moves are very different from the 'minds of groups' (or crowds, or even herds) which appear in some of the later forms of psychological theory.

* *Das Wesen der menschlichen Verbande*, p. 10.

We may now summarise, in the light of the general considerations which we have assembled, the nature of the contribution which Gierke makes to political theory. He is a lawyer, and he examines as a lawyer the legal nature of groups which have a legal character—the State, with its legal character defined in public law: the associations contained in the State, with their legal character defined in a 'social' law or law of associations. So far, he provides a body of legal material which political science is bound to accept and use. But Gierke is more than a lawyer; he goes beyond law—and that in two ways. In the first place, he is a philosopher, or rather he makes certain philosophical assumptions. He assumes that groups in general—both those which have a legal character, as belonging to the area of the State, and those which have not, since they simply belong to the area of Society—have the capacity of being real persons. Not all groups are actually such persons: a mere partnership between individual partners simply remains a sum of individual persons, and never becomes a real person itself. But groups which are more than partnerships—which are not mere combinations of individuals for greater ease in securing their own private benefits, but have a genuine unity of purpose uniting their members, as members of one body, in the pursuit of a common good—are always real persons; and so far as law is connected with such groups, it must recognise the fact of their real personality, and give that fact true legal expression. In the second place, we may say that Gierke is a sociologist as well as a lawyer, if by 'sociologist' we mean that he is a student of Society as well as of the State. He does not entirely confine his exposition of groups to groups which have a legal character. He deals, incidentally, in the chapters translated in this volume, with the group which he calls international society, which for him stands outside and above the State, and again with the group which we call religious society, or the Church, which in his view stands outside and beside the State. He admits, and indeed he insists, that law, as law, is concerned only with groups 'whose unity is expressed in a legal organisation'—groups 'which act in the area of law'.* But the groups which lie beyond the immediate scope of law are not entirely excluded from the lawyer's ken. The folk, or national society, is a powerful factor affecting law, and it has to be considered in the study of law: international community issues in law, if it is not in itself a legal entity; and religious society has a similar

* Ibid. pp. 23, 30.

quality.* Law proper—law in its strict and limited sense—is necessarily one-sided. In a passage of his lecture on 'The Nature of Human Groups', Gierke seeks to delimit the exact nature of its sphere, and to explain how the lawyer must recognise both the limits to which he is confined and the factors which lie beyond them. 'The life of law is only one side, and by no means the most important side, of community life. The science of law must never forget this one-sidedness. It must always bear in mind that the living forces of the various social organisms express themselves outside the area of law (*Recht*), in all the movements of might (*Macht*) and of culture in the general community life, and achieve their greatest triumphs independently of law—and even in opposition to law. Legal science must leave it to other sciences to discover the cohesions that exist, and to trace the unities that act, in all this extra-legal sphere. But while the science of law must thus receive from other branches of science the confirmatory evidence which they can give of the reality of community, it can also make a claim upon them. It can ask that its own account of the legal expression of this reality should be duly considered in any thorough and genuine investigation of social data other than legal.'†

Such is Gierke's own view of the relation of legal science to social and political theory Legal science primarily studies legally organised groups as such—the State, as legally organised under public law. the legally organised groups inside the State, as organised under the law of associations. It may also study, secondarily, such groups as are not legally organised, but none the less affect law—groups such as national society, international community, and religious bodies. On the whole, however, it leaves to other sciences (the social and political sciences) the general study of these social groups, and it accepts from those sciences the evidence which they provide. *Per contra*, it may fairly claim that they shall accept *its* evidence, and shall take into account *its* theory of legally organised groups.

In its general features, and in its broad lines, this view must command our allegiance. On the other hand it does not follow that Gierke's particular theory of the real personality of groups must necessarily be accepted. It is something more than a legal

* Ibid p 24. In reading what Gierke says of international community we must remember that he was writing before the days of a legally organised League of Nations.

† Ibid. p 31.

theory. It is a legal theory which starts from philosophical assumptions which we may question, and presses a biological analogy to a length which may raise our doubts. Nor is it easy to accept an ethical corollary which Gierke seeks to draw from his legal theory. Ethical theories may lead to legal corollaries; but it is difficult to see why a legal theory should issue in a moral rule. Yet at the end of his address on 'The Nature of Human Groups', Gierke seems to take this line. 'One thing', he says, 'may be permitted to a jurist: he may suggest the moral significance which belongs to the idea of the real unity of the community.' He proceeds to argue that it is only this idea of a 'real unity' which can produce the belief that a group is of value in itself; and only the belief that a Whole has a higher value, as compared with its parts, can justify, in turn, the moral duty of man to live and die for the Whole * We may fairly rejoin, to such an argument, that a theory is not proved to be true by being proved to be necessary to the ethical rule of 'living and dying for the Whole' unless that rule is true in itself. We may also rejoin that the rule of living and dying for the Whole, even if it be accepted as true, does not necessarily require as its basis any idea that the Whole is 'real' in the sense of being an entity or a person. Even if a group is only 'ideal', in the sense of being a common idea or set of ideas entertained by its members, we have to recognise that thousands of our kind have died for the sake of an idea Even if a group is only individuals, one man may die for the sake of others, if he believes that he best serves their happiness thereby and that he ought to serve their happiness

§ 3

THE LAW OF NATURE

The conception of a Law of Nature goes back, like so many of our conceptions, to the Greeks. Aristotle, in the (*Rhetoric*), distinguishes between law which is 'particular', or positive, and law which is 'common', or 'according to nature' † This implies the idea of a common law which is natural to all humanity. Similarly, in the (*Ethics*) in speaking of 'civic justice', which regulates the relations between citizen and citizen, he distinguishes between the 'natural'

* Ibid p 31 There seems to be a leap from the idea that a group has value in itself to the idea that it has a *higher* value.

† *Rhetoric*, 1373 b4.

element, which has the same validity everywhere and does not depend on enactment, and the 'conventional' element which is purely positive.* In Aristotle's general terminology the word 'natural', as applied to man and human things, has three senses. It is something which is immanent in the primordial constitution of man, as a potentiality of development. Again it is something which has developed with his development—something which is a growth of his potentiality, but a growth in which his 'art', or creative mind (which is part of his constitution), has co-operated with the promptings of what we may roughly call his instinct, or immanent impulse. Finally, it is something which is inherent in the final development of man, and part of his final cause or purpose. All three senses are interconnected, and interconnected in virtue of the idea of development. If we take them all into consideration, we shall see that a 'natural law' will not merely mean a law which is co-extensive with man, or universal: it will also mean a law which has grown concurrently with man, and is, in a sense, evolutionary—yet not so evolutionary but that man's 'art' has co-operated in its growth. The antithesis between natural and conventional, which is only a *prima facie* antithesis, will disappear; and we shall have a vision of an historically developed law which has both a positive quality and a root in the nature of man.

If Athens had possessed a more highly developed body of law, and if Aristotle had applied his general conception of 'nature' to it, legal speculation might have run a different course, and the world might have escaped a long conflict between the natural and the positive schools of law. As it was, the little that he said on this topic of natural and positive law bore little fruit; and it was another school of philosophy—the Stoic—which was destined to influence the history of jurisprudence. To the Stoics Nature was synonymous with Reason, and Reason was synonymous with God. They believed that the true city or polity of mankind was a single 'city of God', or cosmopolis (transcending the old historical and positive cities), and that all men were united, as reasonable creatures, in this city of God, which was also a city of Reason and of Nature. They believed that true law was the law of this city—the law of Reason; the Law of Nature. According to the teaching of Zeno, the founder of Stoicism, men should not live in different cities, divided by separate rules of justice; they should consider

* *Ethics*, 1134 b18–21.

all men fellow-citizens, and there should be one life and order, as of a flock on a common pasture feeding together under a common law.* This common law (κοινὸς νόμος), which is the law universal and natural, may remind us of the κοινή or *lingua franca* of the Hellenistic period. It is the legal corollary to the linguistic fact of a universally diffused speech, which in turn was the corollary to Alexander's world-State. But the κοινή was actual fact: the κοινὸς νόμος remained an aspiration. It was an ideal law which could only become actual if men were purely rational. Its principles were ideal principles. Among these ideal principles was that of equality. By nature, and as reasonable creatures, all human beings were equal. By nature the woman was equal to the man, and the slave to the master This was the teaching of Zeno; and it was a teaching which had its effects, in later days, in Rome.

In Rome we find a highly developed body of law such as Athens never attained. Indeed we find, by the time of Cicero, three different bodies or conceptions of law. The first is the *jus civile*, which is the law applicable only to Roman citizens. The second is the *jus gentium*. From a practical point of view we may regard *jus gentium* as a body of commercial law enforced by the Roman courts in all commercial cases, whether the parties to such cases were citizens or foreigners. From this point of view its essential content is the law of contract, including the contract of *societas* and that of *mandatum*. From a theoretical point of view *jus gentium* was defined by the Roman jurists as 'the universal element, in antithesis to the national peculiarities (*jus civile*), to be found in the positive law of every State'.† Here we recur to something very like the 'common law' or 'natural justice' of which Aristotle speaks. Hence, too, it is easy to move forward to the third conception of law which we find in the Roman lawyers—that of *jus naturale*. We may define *jus naturale* as 'the law imposed on mankind by common human nature, that is, by reason in response to human needs and instincts' ‡ It is difficult to distinguish between *jus gentium*, as defined from the theoretical point of view, and *jus naturale*; and indeed the Roman jurists were never agreed that there was any distinction between the two. But we may at any rate say that while *jus gentium* can be regarded from a practical point of view, and when so regarded is

* Plutarch, *de Alex Fort*, i, 6 The Greek word for law is the same as that for pasture, except for a difference of accent (νόμος and νομός)

† Professor de Zulueta, in the *Legacy of Rome*, p. 201.

‡ Ibid p. 204

mainly a body of commercial law concerned with contracts, *jus naturale* is always a general legal ideal. It is, in its essence, the Stoic ideal of a common law of all humanity, which is a law of Reason and Nature. It is permeated by the Stoic principle of equality: *omnes homines natura aequales sunt*—they are equal persons in the great court of Nature. It is not a body of actual law, which can be enforced in actual courts. It is a way of looking at things—a spirit of 'humane interpretation' in the mind of the judge and the jurist—which may, and does, affect the law which is actually enforced, but does so without being actual law itself. No Roman jurist ever asserted that Natural Law overrode concrete and positive law, as was asserted in the Middle Ages and afterwards; all that they did was to allow their idea of Natural Law to affect the actual law when it came to be applied in the courts. Nor did any Roman jurist ever associate Natural Law with a particular date or epoch, or assign it to the days of a state of nature, 'when man came from the hand of his Maker' Natural Law was timeless; but if there was any time at which it attained its zenith, that time was in the fullness of the days, and not in their beginning.

Stoicism had passed into the *jus naturale* of Rome. The *jus naturale* of Rome passed in turn into the tradition of the Christian Church. But the early Christian Fathers, holding that man's pure nature had been vitiated by the Fall, drew a distinction between what we may call (following the interpretation of Troeltsch) the 'absolute' Law of Nature, and 'relative' Natural Law. The absolute Law of Nature, in man's uncorrupted state of primitive grace, is a law which knows no *dominium* There is no *dominium* of government over subjects, or of owners over property, or of masters over slaves: 'by nature' men are free from the State, they own all things in common, and they are equal to one another. But there is also a relative Natural Law, adjusted to the change of man's nature after the Fall, and relative to that change. The State, and property, and even slavery, can all find their place in the scheme of this law; but they must all have something of an ideal character, and rise above sin to the dignity of remedies for sin, if they are to be really entitled to that place The relative Law of Nature is a sort of half-way house between an absolute ideal, vanished beyond recall, and the mere actuality of positive law. It was not easy to occupy a half-way house without being exposed to attacks from either side. Sometimes the absolute ideal might rise in insurrection against property and political authority and human inequality; more often the

positive fact asserted its absolute right. But the tradition of a Law of Nature, which generally took the form of relative Natural Law, continued to survive in the Catholic Church, not only during the Middle Ages, but also in modern history. St Thomas Aquinas found room in his philosophy for four species of law, all hung by golden chains to God. There was the positive law enacted for mankind by God Himself, in His revelation of His will through the Scriptures (*lex divina*), there was the positive law enacted for its members by a human community, through a representative prince, in virtue of an authority of which the *principium* came from God (*lex humana*). Behind the positive law enacted by God—and indeed, we may add, behind all other law whatsoever—there was the law of all creation resident in the supreme and unchanging purpose of God for all His creatures (*lex aeterna*); and behind the positive law enacted by a human community there was the Natural Law discovered by man's divine faculty of reason, as it sought to apprehend the purpose of God's Will and the rule of His Reason (*lex naturalis*) * This was the scheme on which the thought of the Church continued to move; and in that scheme the idea of Natural Law continued to play a conspicuous part, even after the end of the Middle Ages The great moral theologians of the sixteenth century (or, as Gierke calls them, 'the ecclesiastical writers on Natural Law'), who were occupied with the study of moral and political philosophy in its relations to theology, discussed political philosophy in terms of Natural Law. Conspicuous among them is the great Spanish Jesuit, Suarez, who regarded the Sovereign as 'the disciple of the law natural'; but there were many others of his Order (among them Lessius, Lugo and Molina) who wrote works *de justitia et jure* expounding a natural-law philosophy of Society and the State; and members of other Orders (such as the Dominican Soto) followed the same example

But to understand the full bearing of the tradition of Natural Law, even during the Middle Ages themselves, we must return from the Church to the Roman lawyers; for without the substance and content of Roman law—not merely its conception of *jus naturale*, but its whole general body and sum of conceptions—Natural Law

* It became a question among ecclesiastical thinkers whether Natural Law was a command of Divine Will or a rule of Divine Reason see below, p 98 On St Thomas's general view of law, see G. de Lagarde, *Esprit politique de la Réforme*, Introduction

would always have been a tenuous and shadowy thing.* Here we must go back to the great Renaissance of the study of Roman law which began with the Bolognese jurists at the end of the eleventh century. The *Corpus Juris* of Justinian—the Code, or body of statute-law, and the Digest, or body of case-law—now became a subject of study (primarily in Italy and southern France, but eventually in all the Universities of Europe) on which legal and political thought was nourished. Nor was it only a subject of study. A *caput mortuum* might have been that. But Roman law was a *lex animata*, which moved and inspired the living world. On the ecclesiastical side it passed into the active body of Canon Law, which was not only taught by the canonists, but also practised in the ecclesiastical courts. On the temporal side it began to be adapted to the needs of secular life and the requirements of secular courts. If the early commentators of the twelfth and thirteenth centuries (the Glossators) had confined themselves to the study of Roman law as it stood in the actual text of Justinian, the commentators of the fourteenth and subsequent centuries (the post-Glossators or Bartolists) sought to bring their studies to a practical point, and attempted to adapt Roman-law principles to the needs of actual life. Their labours produced two different and contradictory results. Immediately, by adjusting Roman law to the needs of general contemporary life, they helped to secure its general diffusion as a European body of practical law which could claim, as a whole, to be universal and 'natural'. Ultimately, by giving it a practical and positive character as a body of practical and positive rules, they helped to produce a reaction (though this reaction does not become evident till the sixteenth and seventeenth centuries), which ran in favour of a new view of Natural Law as something distinct from Roman law—a 'pure' law which transcended the merely 'applied' law of the civilians †

* In other words, the Natural Law which was a *part* of Roman Law, and one of its conceptions, is a conception which was adopted and developed by the Church But when the question came to be asked, 'What does this conception of Natural Law actually contain or include?', the answer tends to be, during the Middle Ages generally and down to the rise of a new School of Natural Law after 1500, 'It contains or includes the *whole* of Roman Law, which is, *as a whole*, both supremely reasonable and universally diffused, and is therefore natural'

† Roman law in general came in the Middle Ages to be called by the name of *Jus civile*, which is thus used in a far wider sense than the *jus civile* of the Roman lawyers themselves The teacher and student of 'Civil Law' is the *civilista*, or civilian. The teacher and student of Canon Law is the *canonista* or *decretista*

The immediate result is that which meets us in the later Middle Ages, and is still to be found in the sixteenth century. During this period, there are still bodies of old customary law in the various countries of Europe; in England, indeed, there is a consolidated body of common law which will resist any Romanist trend. But on the Continent, at any rate, Roman legists are busy in most States; and even in England, Roman law is entering into branches of law other than the common law proper. In all the Universities, the English included, it is a great subject of general and international study. [Practised in some degree almost everywhere, and taught everywhere,' it was the law of an international civilisation, and relatively universal'. Because it was thus universal, it could already be called natural; and for this reason alone we may say that 'its veneration in the Middle Ages as Natural Law was not entirely unjustified' * But it could be regarded as natural not only because it was universal, but also because it seemed to be supremely reasonable. It was the expression of human reason in a great body of scripture (*ratio scripta*), which might seem to be parallel, in things earthly, to the heavenly Scripture committed to the Church] And indeed 'the artificial perfection of reason', which the classical Roman jurisprudents had 'gotten by long study', and which the civilians had sought to assimilate by their conning and adaptation of the *Corpus Juris*, was a very high reach of reason

But the very triumph of Roman law was, in one sense, its undoing. Just because it tended so much to become an actual law—just because it was not a 'good old bed-ridden law', but a very lively law which walked the streets and entered the courts—it left room for a new idea of Natural Law, as something distinct from actual Roman Law, which might be professed and studied in Universities as a separate branch of enquiry.] When the reception of Roman law began to be achieved in Germany about 1500, and the civil law of Rome became a current law in the Empire and its principalities, the German interest in the *Corpus Juris* became very largely practical. The old Bartolist tradition of adapting Roman law to the needs of actual contemporary life (which had been contradicted but not checked by the humanists of the sixteenth century, such as Cujas, who wished to understand Roman law as an historical fact of the past in terms of historical scholarship) assumed a new and vigorous life; and a *usus modernus*—a modernisation of the *Digest* or *Pandects* of Justinian, which its votaries called *Pandekten-*

* Professor de Zulueta, op cit p. 181

recht, but which a modern scholar has called 'Wardour Street Roman Law'—occupied the attention of scholars. But free speculative thought still survived, triumphant over particular and immediate exigencies; and the great general problems of the sixteenth and seventeenth centuries afforded a large material for general speculation. There was the problem of the new system of national States; of the principles on which their relations should be based; of the source and the nature of the body of law by which their relations should be adjusted. There was the problem of the new system of national Churches; of their relation to the State; of the nature of both Church and State, and the character of the common framework into which they could both be fitted. Problems such as these demanded a new wealth of conceptions. A new School of Natural Law arose and attempted to open a new mine of thought which should provide that new wealth.

The great age of this School of Natural Law is the seventeenth and eighteenth centuries. It runs from Grotius and Pufendorf to Fichte and Kant But its work was already begun in the sixteenth century; and indeed the great problems with which it sought to deal were problems which had been posed by the development of the sixteenth century. In the sections which are translated in this volume, Gierke accordingly seeks to study the 'natural-law' speculation of the three centuries from 1500 to 1800. We may observe two general features in such speculation In the first place, the Natural Law which is in question is a secular Natural Law. True the Catholic writers on Natural Law, in the later sixteenth century, continue to speak in terms which go back to St Thomas, and indeed beyond St Thomas—terms of divine dispensation. terms which make Natural Law appear as an objective scheme of divinely constituted realities and rules (the reality of the family, for example, and the rules of marriage and the general family system), to which man has to adjust his life if he is to be true to his own divine essence.* But the general view of the thinkers of the School of Natural Law refers that law, and all that depends upon it, to the play of the natural light of human reason. The School is thus a rationalistic school, emancipated from the Church; its tendency, we may say, is to subject the Church to Natural Law rather than Natural Law to the Church; and its thinkers seek to determine the nature of the Church, and the proper scheme of its relations to the

* Cf. infra, in the translator's notes to § 14, note 60 and note 62.

State, by principles which are themselves independent of the Church. In the second place, the school of Natural Law is not only emancipated from the Scriptures of the Church: it is also emancipated from the *ratio scripta* of Roman law. Its Natural Law is based on pure *ratio*, without any adjective or qualification: it is the product of the free lucubration of the legal philosopher, researching *in scrinio pectoris sui*. But the accumulations of the past cannot be easily shed; and researches 'in the desk of one's breast' may only result in the discovery of an absence of material. In actual fact, the School of Natural Law continued to be in the debt of the *Corpus Juris*. When it sought to elaborate the natural rules of international law, it used materials which were mainly drawn from Roman law. When it sought to construct a natural system of constitutional law for the State, and natural rules of 'social' law for groups and associations, it equally used the tools provided by Roman law. It started from Roman-law conceptions of contract and 'partnership' and 'mandate'; it adopted and adapted Roman-law ideas of the *universitas* or corporation We have spoken of the School of Natural Law as working a new mine of thought. More justly and accurately we might say that it took the minted coin of the Roman lawyers, in the form which it had attained after centuries of circulation and revaluation among the canonists and civilians, and sought to melt the metal down and stamp it with a new die

This process of rationalising and (if we may use that word) 'naturalising' old legal conceptions is a process parallel to a phase which we have already had reason to notice in the development of classical Roman law. The theorists and teachers of the new Natural Law (which became a subject of professorial chairs in many Universities), were once more attempting to bring a spirit of 'humane interpretation' into the exegesis of law, as the old Roman jurists who thought in terms of *jus naturale* had attempted to do long before But if we note an analogy, we must also note a great difference The Roman *jurisconsulti* who applied the conception of *jus naturale* were closely connected with the actual profession and administration of law They belonged to the aristocratic *élite* of Rome, and occupied a high position in the hierarchy of the Roman State The theorists of the new Natural Law might often pass into the service of the State, and hold judicial or administrative or diplomatic posts; but in itself Natural Law was a speculation of theorists and professors. It had (in no derogatory sense of the word) an academic quality. Its immediate life was the life of

lectures and text-books; and it moved more in the world of thought than in the world of action.

But the world of thought is an important world, and the School of Natural Law was deeply entrenched in its recesses. Its very academic quality brought it into close contact with the philosophies and the philosophers of the seventeenth and eighteenth centuries. Grotius and Pufendorf must count among the great thinkers of their day. Burlamaqui brought the principles of Cartesianism to the elucidation of Natural Law in his *Principes du droit naturel*, published at Geneva in 1747.* Wolff put the philosophy of Leibniz to a similar use in his *Jus naturae*, published at Frankfort from 1740 to 1748; and Vattel, another follower of Leibniz, followed much the same line in his *Droits des Gens, ou Principes de la loi naturelle* (1758), which is largely based on the work of Wolff. Just as the writers on Natural Law go to the philosophers for their principles, so the philosophers have recourse to Natural Law for their political terminology and many of their political ideas. Hobbes and Spinoza write in these terms—though the *jus naturae* of Spinoza, coloured by his pantheism, is rather a universal force, flowing from the power of God, than the dictate of man's natural reason and the human sense of right. Locke and Rousseau (if we may count Rousseau among the philosophers) have frequented the writers of the School of Natural Law, and we might even be tempted to say that Rousseau simply stylised their material, were it not that such a saying would be unjust to the intuitions of genius, and the insight of imagination, which Rousseau was able to add to the charm of his style and the clarity of his exposition. Kant and Fichte have an even larger background of natural-law theory and material; and we can hardly study their legal and political philosophy with a just appreciation, unless we remember the preparatory foundations laid by the great German writers on Natural Law during the eighteenth century—Heineccius, Thomasius, Wolff and Nettelbladt.

From one point of view, the School of Natural Law was engaged in the general study of all forms and phases of human society which were capable of developing a law or of being regulated by law. It

* It was from this work, translated into English in 1748, that Blackstone drew the observations on Natural Law which curiously diversify the introduction to his *Commentaries*, and which stirred Bentham to indignation and the publication of his *Fragment on Government*. Bentham did not realise that in attacking Blackstone (who had never acknowledged his source) he was really attacking Burlamaqui. Cf the article on Blackstone in the *Dictionary of National Biography*.

dealt with the State: it dealt with the relations of State to State, in peace and in war; it dealt with groups other than the State, from churches to commercial companies, and it dealt with the relations of the State to such groups. From this point of view we may say that the study of Natural Law issues in some four different branches of theory—a theory of Society at large: a theory of the State; a theory of the relations of States—or, in other words, of international law; and a theory of associations and their relation to the State. From another point of view, however, the Law of Nature might seem to find its specific and particular application in the one subject of international law. The relation of States, it might be argued, stood in special need of the illumination of Natural Law, because there was so little law of any other sort by which they could be explained or regulated. From this point of view a treatise on the Law of Nations (*droit des gens*) might bear the title, or at any rate the alternative title, of a treatise on the Law of Nature (*droit naturel*). In the general conception, however, the study of the Law of Nature continued to be a general study of the State, in the whole of its range and extent, not only on its external side and in regard to the proper rules of its international relations, but also on its internal side and in regard to the proper system of its constitutional and civil law. Vattel, if he devoted three of the four books of his treatise to 'the nation considered in its relations to others', assigned the whole of the first to 'the nation considered in itself'. Rousseau, if he dealt with the State only on its internal side in his *Contrat Social*, and if he thus limited his interpretation of Natural Law to the scope of Vattel's first book, intended to pursue his interpretation further, into the field of the State's external relations. 'Après avoir posé les vrais principes du droit politique', he writes in his final chapter, 'et taché de fonder l'État sur sa base, il resterait à l'appuyer par ses relations externes, ce qui comprendrait le droit des gens.' His publisher pressed him to complete his design, and he seems actually to have begun work; but the *Contrat Social* remained the only completed half of the intended whole *

Rousseau is a Janus-like figure in the history of the School of Natural Law. He turns to it, and belongs to it: he turns away from it, and belongs elsewhere. He is not, by profession, a master of Natural Law; he is a man of letters who makes a brilliant incursion

* Professor A. de Lapradelle, preface to the edition of Vattel in Classics of International Law, vol. I, p. xxxi.

into its field, and returns in triumph with *opima spolia*.* But there is a deeper and a more philosophic sense in which he may be said both to belong and not to belong to the School of Natural Law. On the one hand he has the individualism of that school; and he has also its universalism. He believes in the free individual, who is everywhere born free. he believes in a universal system of *droit politique*, which rests on a ubiquitous basis of individual liberty. If he had followed this line of belief to its ultimate conclusion, he would have been a votary of the natural rights of man, and an apostle of undiluted liberalism But there is another side to his teaching—a side which is at once very different, and, in its ultimate influence, far more important. The final sovereign of Rousseau is not an individual or a body of individuals. The final norm of social life is not a body of Natural Law, issuing in a system of natural rights, which proceeds from the reason of the individual, and is everywhere the same because that reason is everywhere identical. The sovereign of which he speaks is a 'moral person'; and the final norm is the 'general will' of that person. Now it is true that *persona moralis* was a term of art in the School of Natural Law, by which it was used to signify the nature of a corporate group, as a 'person' which was something other than a physical person; and it is also true that the idea of the will of *omnes ut universi*, as distinct from the will of *omnes ut singuli*, was an idea also current in that school But it is equally true that the 'moral person' and 'general will' of Rousseau are ideas which transcend the limits of natural-law thought. Rousseau was a romantic before Romanticism; and he prepared the way for the new style of German thought which was to divinise the Folk-person, and to historicise law as the expression in time of the general will or consciousness of right which proceeds from that person. Hegelianism and the Historical School of Law can find their nutriment in him, if he himself found his nutriment in the School of Natural Law; and while the springs of the past flow into his teaching, the springs of the future also issue from it. It is in this sense above all that he is a Janus-like figure It is from this point of view that we may also say that he is a bridge across the gulf which, in the theory of Troeltsch, divides the *Naturrecht und Humanitat* of western Europe from the Historical Law and the Folk-cult of Germany. Rousseau touches at one end the internationalism, and the sense of an all-

* On the relations of Rousseau to the School of Natural Law, and his use of its conceptions and terms, see the translator's remark in note 197 to § 16.

pervading impersonal Right, which were among the merits of the old School of Natural Law; but he also touches at the other the nationalism, and what we may call the personalism, which were to be the marks of a new dispensation of thought.

But this is to anticipate; and we must return from Rousseau (who is both the consummation and the end of *Naturrecht*) to the School of Natural Law as it stood in itself, apart from the new ingredients which he introduced. There was dynamite in Rousseau; but there was also dynamite in the pure School of Natural Law. To begin with, there was the current conception that Natural Law somehow overbore law positive, so that enactments and acts of State which ran contrary to its prescriptions were strictly null and void, even if in actual practice, owing to the absence of any machinery for their disallowance, these acts and enactments retained their validity. Such a conception—applied in various forms, sometimes with a greater and sometimes with a less degree of reverence for actual law—was a ready solvent of political obligation. The rebel against constituted authority could easily plead obedience to the higher law, and could readily allege that he was only exerting, or defending, the natural rights which he enjoyed under that law. The idea of a natural system of public, or constitutional, law was particularly explosive. According to that idea there was a natural 'law of the constitution' common to every State. Historic constitutions were threatened in any case by such an idea; but if the idea were made to issue in a natural 'frame of government' based upon general popular assent, and a 'declaration of natural rights' proceeding from the general popular voice, the threat became obvious and definite.

The American Revolution, as it ran its course from 1764 to 1776 —from the first beginnings of resistance down to the Declaration of Independence and the creation of new colonial constitutions— was inspired by the doctrines of Natural Law. An English judge had uttered the *obiter dictum*, in 1614, that 'even an Act of Parliament made against natural equity.. is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*'. In England the dictum had carried no weight;* but it lived and grew to a great

* Blackstone, in the introduction to his *Commentaries*, § 11, where he is borrowing from Burlamaqui, remarks, 'This law of nature...is of course superior in obligation to any other . no human laws are of any validity if contrary to this, and such of them as are valid derive all their force. .from this original'. But later in the same introduction, when he is writing independently, at the end of

power in the North American colonies. James Otis, one of the Boston lawyers, is already declaring, in 1764, 'should an Act of Parliament be against any of His natural laws...the declaration would be contrary to eternal truth, equity and justice, and consequently void'.* The very phrase of 1614, 'the immutable laws of nature', becomes a battle-cry: it is often used by the great Boston agitator, Samuel Adams; and perhaps at his instigation it is inserted in the Declaration of the first Continental Congress, in 1774, when the deputies declare that the colonies, by the immutable laws of nature, have certain rights, and that certain Acts of Parliament are violations and infringements of these rights.† In the Puritan atmosphere of North America the secular Law of Nature recovers its theological basis. Samuel Adams claims for his countrymen the indefeasible rights with which 'God and Nature have invested' them;‡ and the Declaration of Independence claims for the people of America the station to which they are entitled by 'the Laws of Nature and of Nature's God'.§ It was the Law of Nature which, more than any other force, exploded the authority of the British Parliament and the British connection; and it is curious to reflect that Vattel's work on the principles of Natural Law was currently used in the *sodalitas* of the Boston lawyers (a sort of political science club) during the crucial years of the Revolution ‖ Nor was it only in the work of destruction that the theory of Natural Law was employed. It also served the cause of construction. The Virginian 'Declaration of Rights' and the Virginian 'Constitution or Form of Government' of 1776, and the Pennsylvania Constitution of the same year, which contains both a declaration of rights and 'a plan or frame of government', are both founded on the theory of Natural Law. If we seek to find the general ideas by which these documents were inspired, we shall find them in the first book of Vattel's treatise, and particularly in its second and third chapters. Whether or no the framers of the documents had Vattel actually before them, they were using the common stock of ideas on which he had drawn, and which he had presented in lucid French.¶

§III, he observes, 'If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it'.

* S. E. Morison, *Sources and documents illustrating the American Revolution*, p. 7.

† Ibid. pp 119, 121.

‡ Ibid p 94 § Ibid p 157.

‖ Van Tyne, *Causes of the War of American Independence*, vol I.

¶ Cf A. de Lapradelle, *op. cit.* p. xxx (and especially note 1), where an account is given of the vogue of Vattel in North America, especially after 1775

Nothing need here be said about the effects of the theory of Natural Law on the course of the French Revolution. It is a theme on which Gierke himself dwells.* Nor need any words be said about the elements of natural-law theory which appear in Kant and Fichte. Of that also Gierke himself has spoken. But there are two things which ought to be mentioned before we leave the School of Natural Law. One is that its views were not always explosive and anarchical, or even liberal and democratic. If there were some writers who made positive law a mere earthen vessel as compared with the solid iron of the law natural, there were others who gave the victory to positive law, and others again who, in a spirit of happy optimism, believed that the framers of positive law would be sure to follow the dictates of Nature and to avoid the possibility of quarrel. Nor was it always the case that, in treating of the principles of natural public law (or, as Rousseau calls them, *les principes du droit politique*), the natural-law thinkers committed themselves to the proposition that the people should properly frame its own constitution, or elect its own governors, or bind them in the iron fetters of its own declaration of rights. On the contrary, as Gierke shows, there were always two lines of opinion on these matters in the School of Natural Law; and while in the eighteenth century, from Locke to Vattel and Rousseau, and from Vattel and Rousseau to Fichte himself (in the earlier stage of his thought), opinion inclined to what we may call 'popularism', the thinkers of the seventeenth century mainly inclined to the absolutist cause Grotius and Pufendorf were too near to the problems of the nascent modern State to desert the cause of authority, and Nature could be used to consecrate the monarch as well as the people. All through the history of the School of Natural Law we can find advocates of the Sovereignty of the Ruler as well as of the Sove-

* As we have already mentioned, in an earlier passage of this introduction, Gierke did not extend his researches into the American Revolution He is silent about Vattel, and he has not comprehended in his scope Paine's 'Rights of Man', a *naturrechtlich* pamphlet based on American experience He also omits some other English writers of the later eighteenth century who were influenced by the American and French Revolutions, and whose thought had natural-law elements, such as Dr Price, Dr Priestley and William Godwin In a word, he has dealt generally with the great European thinkers, and he has devoted particular attention to the thought of Germany, but he has not been able to find time or space for lesser lights in other countries (He deals, for example, with Bodin in the sixteenth century, but not with Loyseau in the seventeenth, he considers the Huguenot writers of 1570 and afterwards, but not the Huguenot writers (such as Jurieu) of 1680 and afterwards.)

reignty of the People—not to mention the champions of the 'double sovereignty' of both, or the exponents of the 'mixed constitution', who sought to achieve an eirenicon between the two causes.

In the second place, we must not too readily dismiss the School of Natural Law as unhistorical, or as crudely individualistic, or as vitiated by a fundamental error of rationalism. There would, of course, be a measure of truth in all these accusations. Natural-law thinkers were apt to talk of an unhistorical 'state of nature', and of an unhistorical act of contract by which men issued from it. They played with individuals as counters, and they often forgot the deeper unities of social life. They thought of men as acting by rational calculation: they neglected the areas that lie below reason, or by the side of reason; and they did not sufficiently recognise that reason itself is a 'bank and capital of the ages' which grows by a gradual process of social accumulation and transmission. On the other hand, historical criticism of the School of Natural Law which makes merry with its state of nature and its contract may very well miss the mark. The natural-law thinkers were not really dealing with the historical antecedents of the State: they were concerned with its logical presuppositions; and there is still a case to be made for the view that the State, as distinct from Society, is a legal association which fundamentally rests on the presupposition of contract. In the same way, the individualism of natural-law thought may be readily exaggerated; and in any case, if we hold that individual personality is the one intrinsic value of human life, we shall have no very great reason to fling stones at a theory which rested on a similar basis. It is what we may call the short-time rationalism of the natural-law school which is open to a juster criticism. It is not the νόησις μονόχρονος of the philosophic jurist which can discover the deep foundations of social life There is a long-time process of social thought, revolving and ruminating the problem of a right order of human relations (or, in other words, the problem of justice), which lays the foundations on which the State is built, and on which it builds. Social thought about justice, issuing in the constitution of a State, and then translated by the government of that State into a declared and enforced law—this is the basis on which we must build our philosophy of law and the State. Here the historical argument enters again, in a deeper sense than when it is used to refute the historical existence of states of nature and social contracts. The long-time process of social thought is a great historic fact, and we must reckon with that fact. This is the

fundamental justification of the School of Historical Law which arose in Germany at the end of the eighteenth and in the beginning of the nineteenth century. And yet it is not enough to hold that law is simply an historical product, evolved in this or that direction, under this or that set of contingencies, by this or that peculiar people. To hold such a view is to be content with a law which is merely an empirical fact, and has no anchor in the flux of history Social thought, as it operates in time, is indeed a basis of justice; but the mind of man will always demand that the core of justice shall be beyond time and space—*quod semper, quod ubique.* The School of Natural Law had some sense of that timeless and spaceless core. That is why, as Gierke writes in a noble passage of his work on Althusius, the undying spirit of Natural Law can never be extinguished. That is why we must somehow incorporate that undying spirit in our modern conception of Historical Law. For then 'the sovereign independence of the idea of Justice, secured before by the old conception of Natural Law, will still continue to be firmly secured by our new conception of Law as something thoroughly positive—no matter whether the idea which opposes that conception be the idea of social utility, or the idea of collective power'.*

§ 4

THE SCHOOL OF HISTORICAL LAW

The beginnings of the School of Historical Law in Germany are rooted, in their immediate origins, in a reaction against Natural Law—a reaction against its rationalism, against its universalism, and against its individualism. Instead of pure *ratio*, covering the world and time with its system of rational rules, and proceeding from and returning upon the individual, there was to be substituted the *Volksgeist*, immersed in the historical flood of its own particular development, and immersing the individual in the movement of its own collective life. Law, on this view, is essentially *Volksrecht*. it is the product, in each nation, of the national genius. A new movement of thought thus recurred to the idea of national law, which Rome had slowly transcended in the millennium of legal development which lay between the Twelve Tables of 450 B.C. and the issue of the Digest in A.D. 533. It rejected, as an incubus

* See Appendix II, p. 224.

upon the growing life of nations, the conception of a supernational rule of right, whether that conception took the form of adhesion to Roman law as a *ratio scripta* for all humanity, or issued in the proclamation of a new Natural Law based on pure *ratio naturalis*. The Nation revolted against *Natura*. This was the essence of the revolution in German thought which began a century and a half ago.

It was a revolution which was contemporary with, and largely influenced by, the French Revolution. The French Revolution, it is true, was in some respects fundamentally different. It was a revolution not against 'Nature', but in the name of 'Nature'; it proclaimed the natural and imprescriptible rights of men and citizens, as recited in the Declaration of 1789, against an outmoded absolutism and an outworn social system. But the Revolution also proclaimed the rights of the Nation and the principle of *souveraineté nationale*; and its future course—whether, by edicts of fraternity, it sought to elicit national movements in its own support, or whether, by the oppression of its tutelage and its exactions, it involuntarily produced national movements directed against itself—was destined to encourage the philosophy of the *Volk*. It was amid the storm and thunder of the Revolution and the Empire, and, in particular, amid the passionate fervours of the movement of Liberation which followed on the battle of Jena, that the theory of the *Volksgeist* and of *Volksrecht* attained its strength and its splendour.

But the Romantic movement, from which the revolution in German thought takes its beginnings, is even earlier than the French Revolution It is a movement which we may trace as early as 1770 It is a movement back to the Middle Ages; back again, behind them, to the primaeval sources of Teutonic antiquity; back, in a word, to the homely and indigenous core of the life of the German people. It is a literary movement; but it is a literary movement with an immanent philosophy of its own. That philosophy is a philosophy of the Folk, as a Being which creates language for its utterance; which utters itself through its language in folk-songs and folk-tales; and which sets the folk-songs it has written to the folk-tunes it has composed. Herder first expressed this general philosophy, from 1784 onwards, in his *Ideen zur Geschichte der Philosophie der Menschheit*—a work which Gierke repeatedly cites in his footnotes, and to which, in a lecture delivered before the University of Berlin in 1903, he ascribes a large creative

influence in producing the School of Historical Law.* Whether it was the creator, or whether it was only the harbinger, Herder's work was certainly followed by a rich Romantic harvest. The general nature of that harvest is set out in the lecture by Professor Troeltsch which is translated as an appendix to this volume. All that need here be said is some few words about three particular fields —the field of language and literature; the field of Hegelian philosophy; and the field of law. In all of them we shall find the idea of the folk-soul winning its conquests, and vindicating its magic as a universal key of interpretation.

To understand the folk-soul it was necessary, first of all, to collect and appreciate the monuments of its speech, its songs, its tales. Between 1806 and 1808 Arnim and Brentano published *Des Knaben Wunderhorn*—a golden treasury of *Volkslieder* which inspired, and has continued to inspire, German poets and musicians In 1812 the brothers Jacob and William Grimm published the first volume of their *Marchen*—fairy-tales, as we now say, but the word 'folk-tale' would be nearer to the purpose of the compilers. Jacob Grimm, whose long life only ended in 1863, was to carry his researches into folk-literature and language through many realms of study. He studied language in the four volumes of his *German Grammar*, seeking to relate its growth to the development of the people's voice and the evolution of the people's thought. He traced folk-poetry in law; and he sought to recover the legal antiquities and to collect the ancient 'dooms' of primitive Germany. In his *German Mythology* he recreated the ancient gods, and revealed the old figures of Folk-religion and popular superstition In his hands the Folk became no longer an abstraction, or a postulate of theory, but a storied and documented being, expressed in language and ballad and saga, in legal *Weistumer* and religious myths.

The conception of the folk-soul not only inspired the philologist and student of literature. It also inspired the historian; and we may trace its efforts in Niebuhr's *Roman History* and his method of using conjectured ballads of the Roman People to discover the early history of Rome. Above all, it also inspired the philosopher. We may say of Hegel and the Hegelians that they took the Folk and lifted it into the heavens of metaphysics. In their philosophy the Folk becomes a Mind—and not only a Mind, but also an incarnation of the Eternal Mind. In its eternal process, the Eternal Mind

* See the address on 'The Historical School of Law and the Germanists', p. 5 and note 7.

incorporates itself in folk-minds, which are the incarnations of God in time and space, and indeed *are* God, as He operates within the limits of Here and Now. They are therefore divine; and because they are divine they cover every range of life, and they are also final and right, within their space and time, for all that they cover. Organised in the State, which is the highest power of its life, the Folk attains the highest synthesis of all its faculties. The State reconciles the private 'Morality' of its individual members with the formal system of 'Law' which has been developed on the plane, and to meet the needs, of a common 'economic society' (*die burgerliche Gesellschaft*); and it reconciles them both in the higher unity of a system of social ethics, or *Sittlichkeit*, which is the final reach of the mind of the Folk, strung tense by the power of the State —a reach that carries it back 'into the life of the universal substance'.

The great tide of Romantic thought (which has flowed in Germany ever since, now deep and now diminished, and has risen to a *fluctus decumanus* in this year of grace 1933) flowed also over the field of law Indeed it appeared in law even earlier than in philosophy Hegel's *Philosophy of Law and Outlines of the State* was published in 1821; but the foundations of the School of Historical Law, which regarded law as the historic product of the folk-mind (with the jurist in some way collaborating in the process of production) go back to the eighteenth century. Mention has already been made of the influence of Herder's *Ideen* of the years 1784–5; and Justus Moser, lawyer and statesman in the bishopric of Osnabruck, who published his *Patriotic Phantasies* between 1774 and 1776, may also be counted among the forerunners Hugo, Professor of Law at Gottingen, was already teaching, about 1789, that 'the law of a people could only be understood through the national life itself, since it was itself a part and expression of that life'.* But the definite appearance of the School of Historical Law may be dated from the foundation of the University of Berlin in 1809. The foundation of the University was itself the expression of a national movement. it had been preceded by Fichte's *Reden an die deutsche Nation*: it counted among its earliest professors Fichte himself, the historian Niebuhr, and two great jurists—Eichhorn the Germanist, and Savigny the Romanist. It was these two (both young men, of about the age of thirty, when they began to lecture in Berlin) who wedded law to history, under the common auspices of the Folk which lives

* G P. Gooch, *History and Historians in the Nineteenth Century*, pp. 42–3.

in time and speaks in law. They founded in collaboration a journal of historical jurisprudence; and they devoted long and laborious lives (both lived on into the latter half of the nineteenth century) to the historical study of law.

Savigny was the greater of the two; and it was Savigny's genius which impressed its influence on the new School of Historical Law. The programme of the school was enunciated in his work of 1814, 'On the Vocation of our Time for Legislation and Jurisprudence'. Its motto may be expressed in Savigny's dictum, *Das Gesetz ist das Organ des Volksrechts*. 'For law, as for language', Savigny argued, 'there is no movement of cessation. It is subject to the same movement and development as every other expression of the life of the people....All law was originally formed by custom and popular feeling, next by jurisprudence—that is by silently operating forces '* In the strength of this view he protested against codification, which would imprison the development of law in an iron cage; he protested against *Naturrecht* and all its works; he sought to secure free course for the flood of a people's thought, flowing 'with pomp of waters unwithstood' It is in this succession that Gierke, though he does far more justice than Savigny to the idea of Natural Law, essentially and fundamentally stands. Has he not said, *ex cathedra*, that 'in any scheme of thought which proceeds on the premiss that the social life of man is the life of super-individual entities, the introduction of the *Volksgeist* into the theory of law will always continue to be regarded as the starting-point of a deeper and profounder theory of society'?†

But we shall not fully understand Gierke's own position until we have considered a further development in the School of Historical Law. At first the Germanists and the Romanists—those who delved in the history of German law proper, like Eichhorn in his *History of German Law and Institutions*, and those who researched into the history of Roman law, like Savigny in his *History of Roman Law in the Middle Ages*—worked amicably together. After all, the law of Germany, at any rate since the Reception, contained both elements; and why should not the history of both elements be studied in scholarly amity? But there was an inherent difficulty in this position; and it was not long in manifesting itself. If law was the expression of a *Volksgeist*, German law must be the ex-

* Quoted from Savigny's *Vom Beruf unserer Zeit* in Gooch, *op. cit* p. 49.

† Lecture on 'The Historical School of Law', p 8.

pression of a German *Volksgeist*; and in that case what was to be said of Roman law in Germany? Was it not a foreign body? And should it not be purged away in favour of native and national law, until the German people had recovered its inheritance? When such questions were asked, a rift began to emerge between Germanist and Romanist views. The Romanists, in adopting a national-historical view of law, had put themselves into a position which was logically somewhat untenable; and the more they clung to pure Roman law, uncontaminated by the accretions of the medieval post-glossators and the more recent additions of the German *usus modernus*, the more untenable they made their position. Pure Roman law might be the expression of the soul of the dead and gone people of Rome it could hardly be the expression of the soul of the German people. Savigny might plead that the German people was destined by its nature to assimilate and appropriate Roman law his followers might contend that the law of Rome, at any rate in the sphere of *Privatrecht*, was meant for mankind and transcended national limits; but the plea of Savigny was perilously like special pleading, and the contention of his followers contradicted the basic principle of the Historical School to which they professed to belong Still, Roman law—deeply entrenched both in actual law and in the teaching of the Universities—held its ground; and an opinionated battle inevitably came to be joined between Romanists and Germanists. Twice the Germanist lawyers rallied to the attack In the troubled times about 1848, backed by philologists like Grimm and historians like Ranke, the Germanist lawyers demanded a body of German law based on German history and the German nation. The demand died down in the reaction after 1848. it was renewed, with less ardour but in a more practical form, when a definite scheme for a new civil code for the German Empire was published in 1888

The scheme, in its first draft, contained (or was held to contain) too large an element of Roman law. The effort of the Germanists, which lasted from 1888 until the enactment of the new civil code in 1896, was directed to redressing the balance in favour of Germanism. Gierke, trained by the Germanist Beseler, and himself a foremost figure among the Germanists, threw himself vigorously into the effort. He had recently been appointed Professor at Berlin, in 1887: he had published three great volumes on German *Genossenschaftsrecht*; in the strength of his chair and his publications he contended for a Germanist treatment of associa-

tions in the new code. Something was won by Gierke and the Germanists, if not all that they could have desired; and the struggle ended with both parties resting honourably on their weapons. German law was embedded in the new code—but Roman law had not disappeared. German law was taught in the Universities—but so also, *pari passu*, was Roman. Germany retained the double past of her legal development, and the two contending parties in the School of Historical Law remained true to their contentions. Both were necessary, Gierke confessed in a lecture of 1903, and both would continue to be necessary, if the historical roots of the double past were to be properly traced and interpreted. 'The Romanists will still continue to apply to current law, wherever they can, the great model which is to be found in Roman jurisprudence. The Germanists will never be weary of seeking to champion the independent character of their own country's legal ideas, and to develop further the genuinely German content of our law, along lines of expansion which will bring it into closer accordance with the national genius.'*

There is a calm of reconciliation about these words. But we have to remember, as we read all Gierke's writings, that he was from first to last a soldier in the Germanist section of the School of Historical Law He was arming it by his historical researches before 1888; he was fighting in its ranks between 1888 and 1896; and even after the new civil code came finally into force (as it did at the beginning of 1900), he was still deeply concerned to secure, as we have already had reason to note, that 'the new law should be penetrated by a Germanist spirit and that the growth of its Germanism in the future should be fostered and encouraged'.† He had, as we have already seen, a just view of the inner core of truth in the School of Natural Law. He could also, as we have just noticed, make a due acknowledgment of the part which Roman law must still continue to play in German legal thought. But he is a Germanist of the Germanists, nurtured in the tradition of the Folk, and instinct with the philosophy of *Volksgeist* and *Volksrecht* Born in 1841, he was carried along on the wave of the general movement of Romantic thought. His theory of the Group and of Group-personality, to which it is now time to turn, is a part of that general movement.

* Lecture on 'The Historical School of Law,' p. 33

† Preface to vol. IV of the *Genossenschaftsrecht*, p. XII, cf supra, § 2, ad initium

used in writing the sections which deal with the period from 1500 to 1650. I have therefore selected what seemed to me the main writers of this period (sometimes including, for some particular reason, a less considerable writer); and I have thus added a second bibliography, on the same lines as that which is given by Gierke himself. In addition, as many of the names to which Gierke refers in his own bibliography are little known, if known at all, to most English students, I have occasionally added to his text some brief account, in two or three lines, of the *curriculum vitae* of an author. I have marked by square brackets the passages of this nature which have been added.*

I may end by making two confessions. I am the more bold to make them, because they have already been made by Maitland, at the end of his Introduction. In the first place, I have not attempted to check or verify Gierke's quotations. As Maitland wrote, 'I have thought it best to repeat Dr Gierke's references as I found them and not to attempt the perilous task of substituting others'. I confess that I began to make the attempt. I checked Gierke's references to the *Vindiciae contra Tyrannos* by my own copy, which is the original edition of 1579. But I found that he had used another edition (that of 1631). I soon realised that, though some of his references seemed to me dubious, I could not readily set them right; I said to myself, *Periculosae plenum opus aleae*; and I desisted from a work which I saw stretching out indefinitely before me, with little or nothing gained at the end, since the very few changes that I might have been able to make would hardly have made an iota of difference.

In the second place I would confess once more at the end of this introduction, as I have already done at the beginning, that I cannot be sure that I have rendered faithfully the exact sense of many of the German terms. Here, once more, I may quote some words of Maitland 'The task of translating into English the work of a German lawyer can never be perfectly straightforward. To take the most obvious instance, his *Recht* is never quite our *Right* or quite our *Law*'. I confess that I found *Recht* even more difficult

* The translator is also bound to mention that he has changed the order in which the writers appear in Gierke's own bibliography. There they are printed in chronological order The translator, finding from his own experience the difficulty of referring to a list of names so printed, has substituted an alphabetical order for the convenience of the reader

than Maitland suggests. Not only does it mean something which is neither exactly our Right nor exactly our Law: it also means something which is like our 'rights', and yet not exactly the same *Recht*, to the German writer, is not only something 'objective', in the sense of a body of rules (either natural or positive) which is in one way or another obligatory: it is also something 'subjective', in the sense of a body of rights belonging to a person or 'Subject' as his share in (or perhaps we should rather say his position under) the system of 'objective' Right. If *Recht* was thus troublesome, *Naturrecht*, and its adjective *naturrechtlich*, were even more so. Maitland was so much troubled by the adjective that he invented the English term *nature-rightly*. I found myself shy of that term, and I have translated Gierke's *die naturrechtliche Gesellschaftslehre* as 'the natural-law theory of Society'. But I know that I have not exactly hit the mark. As Maitland says, 'a doctrine may be *naturrechtlich* though it is not a doctrine of Natural Law nor even a doctrine about Natural Law'.

To meet such difficulties, I have put the German equivalent in the text, by the side of the English word, wherever I thought that the reader would like to know what it was, and I have added an explanatory footnote wherever I thought that it was necessary. But that is far from solving all difficulties. A word in one language has a variety of connotations, which it may not have in another. *Gesellschaft*, for instance, means both Society at large, and the sort of particular society which is a partnership or company or *societas* Our English 'society' will not do the same work; and I have had to translate *Gesellschaft* differently in different places *Verein* is more like our English 'society', and I have translated it accordingly. *Verband* I have generally translated by the term 'group'; but for *die engeren Verbande* I have used the term 'associations', which seems to correspond best to Gierke's meaning. But there is a plethora of 'group' terms in Gierke's vocabulary, as we should naturally expect in the writer of a *Genossenschaftsrecht*; and to distinguish their shades of meaning, and to find their English equivalents, is as delicate a matter as the matching of fine colours. I have left *Genossenschaft* as 'fellowship', following good authority. *Anstalt* and *Stiftung*, Maitland has said, find their best correspondent in the English term 'charity'; but I have been driven to translate the one as 'institution', and the other as 'foundation'. Let me conclude by begging the reader to remember that in Gierke's sense

'collective' and 'individual' are the same thing, or rather, two different aspects of the same thing. For 'collective' is not connected for him with the notion of Collectivism, but with that of a mere collection of individuals; and any 'collective' view is thus an individualistic view, which stands in diametrical opposition to his own central principle of real Group-personality.

E. B.

September 1933

THE THEORY OF STATE & CORPORATION IN MODERN TIMES DOWN TO 1650 IN GENERAL AND DOWN TO 1800 IN REGARD TO NATURAL LAW

ANALYTICAL SUMMARY

ANALYTICAL SUMMARY

CHAPTER I

THE PERIOD DOWN TO THE MIDDLE OF THE SEVENTEENTH CENTURY

[The first four sections of this chapter, with their subsections, have dealt with (I) the later history of the mediæval theory of the Corporation, (II) the theory of the Corporation in legal practice, (III) the influence of 'elegant' jurisprudence, and (IV) the influence of the study of German public law. Then follows the final section (V) of the chapter, with its two subsections, §14 and §15.]

SECTION V

THE INFLUENCE OF THE NATURAL-LAW THEORY OF SOCIETY

§§14 and 15

CHAPTER I. SECTION V, §14

THE NATURAL-LAW CONCEPTION OF THE STATE

[The divisions of this subsection are not Gierke's own: they are due to the translator.]

I. *General view of Natural Law*

1. Natural Law as an independent system, distinct from the civilian and canonist body of doctrine, 35. The profound importance of the natural-law theory of the State, 35. Its connection with historical events, 35. Its radical tendency, 35; and its practical objects, 35.

2. The influence of the connection between legal philosophy and political theory in determining the external form of the natural-law theory of the State, 36 The system of political theory based on the law of Reason in the ecclesiastical writers on Natural Law, 36. The culmination of that system in Suarez, 36. The construction by Grotius of a general secular philosophy of law covering the whole area of political life, 36. The 'political' literature proper, 36 The connection between political theory and general public law (*Staatsrecht*), 36. Political treatises independent of Natural Law, 36. The victory of the natural-law theory of the State in Bodin's theory of sovereignty, 37. The controversy between the writers who advocate popular sovereignty and those who advocate the sovereignty of the Ruler on the basis of Natural Law, 37. The *Politica* of Althusius, 37. His successors, 37. Besold's peculiar combination of a natural-law view of the State with an historico-legal view, 37. The crucial importance of Hobbes, 37.

3. The reasons for the increasing influence of Natural Law on public law, 37. The development of a clearer conception of the relation between natural and positive law in the jurisprudence of the civilians, 38. The division of law in general into *jus naturale*, *jus gentium* and *jus civile*, and the subdivision of these, in connection with previous medieval theories, 38. The relation of *jus publicum* to these divisions, 38. The severance of *jus gentium* from *jus publicum*, and the dichotomy of law into natural and positive, 38. The development of a pure theory of Natural Law, 38. New conception of *jus gentium* as international law, 39. Natural Law as the pre-political source and indestructible basis of civil society and political authority, 39. The superiority of Natural Law to positive law which is entailed thereby, 39. The extent and the bearing of such superiority in the field of public law, 39. The irrefragable rule of Reason as the canon of all existing institutions, 39. The finding of a rational ideal for the efforts of all reformers, 39.

4 The theories of the nature of the State developed upon this basis, if opposed to one another, have one thing in common—they all depart from the medieval theocratic conception of the State, 40. The exploration of the State in the light of its own nature, 40.

II. *General view of Sovereignty in natural-law theory*

1. The resultant characteristics of the prevalent conception of the State—(1) human community and (2) sovereign authority, 40 After Bodin the characteristic of sovereignty is primarily emphasised, 40. The conception of sovereignty in natural-law theory, 40 The transformation of an originally negative to a positive conception, 41 Differences of opinion in regard to the extent and the content of sovereignty, 41. They are the result of different conceptions of the end of the State, more especially as between ecclesiastical and secular theories, 41. Different ideas in regard to the [legal] limits of sovereignty, 41; and in regard to its division, its multiplication and its limitations, 41. General agreement, notwithstanding, that sovereignty is an inherent and indestructible original right of the State, which includes all rights of authority whatsoever, 41

2. The controversy about the 'Subject' or owner of sovereignty under Natural Law, 42. The problem separated from the question of the different forms of the State, 42. The question of the position of the People and the Ruler, 43 The transference to the Republic of ideas originally developed in reference to Monarchy, both among the advocates and among the opponents of monarchical absolutism, 43. The division of the natural-law theory of the State into theories (*a*) of Popular Sovereignty and (*b*) of the Sovereignty of the Ruler, 43. Intermediate theory (*c*) of 'double majesty', 43. In addition, various refinements of these main theories, as determined by the attitude adopted towards the problem of the limits of sovereignty, 43. Only in the third place [i.e after the questions have been treated (1) whether the 'Subject' of sovereignty is People or Ruler or both, and (2) whether refine-

ments of these notions of the 'Subject' are necessitated by a theory of the limits of sovereignty] do the further questions arise (*a*) of the relation of positive law to the more exact determination of the 'Subject' of Ruling authority, and (*b*) of the divisibility of ruling authority either in its substance or (short of that) in its exercise, 43.

III. *People and Ruler as separate personalities*

1. General recognition of the People as a personality until the time of Hobbes, 44. A basis found for such recognition in the theory of Contract, 44. The People as a merely 'collective' personality [i e a 'bracket' including a sum of individuals, but not an 'organic' unity], 45 This [collective conception] also appears in the systems of thought which seek to apply the ideas and rules of the [Roman-law] theory of Corporations to the question, 45. The People regarded as a *societas civilis*, 45. The attempts made—particularly by the ecclesiastical exponents of the philosophy of law, Molina and Suarez—to attain the conception of a self-subsistent popular community, notwithstanding this individualist point of view, 46. The conclusions drawn from the 'social' [i e partnership] nature of the State, 46. The combination [of the idea of the State as a 'society' or partnership of individuals] with a corporate point of view, in Althusius and Grotius, 46. None the less, the 'collective' point of view triumphs, 46. The relation of the Ruler to the ruled considered as a result of the antithesis of *omnes ut universi* and *omnes ut singuli*, 47 The common will and the agreed will of all individuals, 47. Requirement in principle of unanimity [i e. the agreed will of all individuals], 47 Identification of majority-will with the group-will by means of a fiction, 47. The possibility of Representation of the group based upon similar foundations [i e upon an agreement of all, fictitiously assumed to be present], 47. Reservation of the rights of the popular community itself as against its representatives, 48.

2. A separate personality is generally recognised as also belonging to the Ruler, 48 It is recognised even by the theory of popular sovereignty, 48. The different nature of the personality of the Ruler under different constitutions, 48. (*a*) When a number of persons are vested with the right of Ruling by a given constitution, the conception of 'collective' personality is again applied [i e the People *qua* Ruler, just as much as the People *qua* People, is regarded as a collection of individuals], 49 The unity of the personality of the Ruler even when there is such a system of the Rule of Many, 49 The relation of the ruled to the Ruling body in aristocracy and in democracy, 49. The identification of the majority with the whole body, 49. (*b*) A single person as the 'Subject' or owner of Ruling authority, 49. Interpretation of the right of the Ruler as being of the nature of an independent right of the monarch, regarded as a natural person, 49. The right of the Ruler only distinguished from the sphere of his private rights 'objectively' [i.e by the difference of the 'objects' to which it relates], 49. Occasional appli-

cation of the idea of a double personality of the monarch, 50. The point of view of the private law of inheritance applied to the succession to the throne, 50. Grotius, 50

IV. *Attempts to eliminate the dualism of People and Ruler The idea of a single State-personality*

1. The tendency of the theory of Natural Law to work out the idea of a single State-personality in place of the dualism of the two personalities of People and Ruler, 50. As a result of its individualistic point of view, however, all that it achieves is an exaggeration of one or other side of the dualism—i e an exaggeration either of the personality of the People, or of that of the Ruler, 50

The relics of the organic conception of the State [surviving from classical and medieval times] still to be found in Natural Law, 50. The comparison with the human body, 51

The juristic result of this comparison, 51. The idea of the social organism, even among the advocates of the theory of Contract, 51. This idea particularly present in Molina and Suarez, 51. The *corpus symbioticum* of Althusius, 51. The organic unity of the State in Grotius, 51. None of these systems of thought achieves recognition of a ruling State-personality as the true 'Subject' or owner of political rights, 52 The supposed organism proves in the last resort to be only a mechanism, 52. The conscious development of a mechanical conception in Hobbes, 52. The conception of the unity of the State-personality could thus be only attained by an exclusive attribution of it to one or the other element of the body politic [Ruler or People], 52.

2 The theory of popular sovereignty is marked by an attempt to elevate the personality of the People to the position of the one and only 'Subject' of political rights, 53 Identification of People and State in the writings of the *Monarchomachi*, 53 To maintain the complete identity of the personality of the People and that of the State proves, however, impossible, in view of the fact that the Ruler is simultaneously acknowledged to be an independent bearer of authority, 53. The dualism of 'persons' cannot be transcended so long as the theory of a contract of government is the basis of argument, 53. It is only when this theory has been entirely eliminated that (1) the idea of the Ruler's personality can be dropped, and (2) the personality of the State can be confined altogether within the limits of the community of individuals, 53. No thinker previous to Rousseau goes to this extreme of Radicalism, 54.

3. The advocates of a 'double sovereignty' also really identify the State and the People, 54 Their distinction between *majestas realis* and *majestas personalis* equally fails, therefore, to produce any recognition of a single State-personality, 54. The relation of these two sovereignties to one another, on the basis of the theory of Contract, 54. Superiority accorded to the *majestas realis* of the People, 54. The results of according that superiority, 54 At the same time the Ruler is regarded as having an independent right to the exercise of *majestas personalis*, 55. Different views in regard to the delimitation of the rights of the Ruler, 55.

4. Grotius' theory of the double 'Subject' of sovereignty, 55. The State regarded as the *subjectum commune*, and the Ruler as the *subjectum proprium*, 55. None the less, in spite of this apparently unambiguous formulation of the sovereignty of the State, Grotius also fails, as the result of his individualistic point of view, to attain any recognition of a single State-personality, 55. His 'collective' view of *populus* and *universitas* [as mere aggregates of individuals], 56. The consequent defects of his interpretation of State-sovereignty, 56. At bottom, Grotius only regards the sovereignty of the State as a sort of continuation, and that merely in idea, of the [original] sovereignty of the People, 56. The conclusions which follow, as regards the continuity of the State when the form of its constitution changes, 56. The distinction between the political and the juristic view of the State [note 124]. The *subjecta propria*, 56. In a given State, the People may be, at one and the same time, both *commune* and *proprium subjectum*, 57. Conversely, the Ruler may have acquired full and complete sovereignty, and possess such sovereignty as his *patrimonium*, 57. As a rule, however, there continue to exist reserved rights of the popular community to participate in the control of the State, 57. The Ruler regarded as the usufructuary, and the People as the owner, of political authority and the territory and property of the State, 57. Further limitations upon the Ruler, in virtue of particular rules of the constitution, 57. The possibility of a *forma mixta*, with complete division of sovereignty as between the Ruler and the People, 58. The failure of Grotius' theory of sovereignty to achieve a permanent hold, 58.

5. The theory of the advocates of the Sovereignty of the Ruler, which makes his personality the one and only active 'Subject' in political life, 58. But so long as they acknowledge the existence of a personality of the People, the upholders of this view also fail to attain the idea of a single State-personality, 58. All modifications of the Ruler's sovereignty simply issue in the doctrine that the People as a personality has a share in the activity of the State, 58. (1) When the doctrine is held—as it is, more especially, by the ecclesiastical writers on Natural Law—that there are inalienable popular rights derived from the very essence of the State, the body of the ruled assumes to a larger extent the character of a definite State-personality, 59. (2) The theory of a conditional contract of government [i.e a contract in which there is not an absolute surrender to the Ruler] produces similar results, 59. (3) Among the advocates of a mixed constitution the personality of the Ruler itself is bifurcated [i e not merely is there a dualism between it and the personality of the People outside it, but there is also a dualism inside it], and political authority is actually divided, or at any rate shared in common, 59. In opposition to such tendencies, the strictly absolutist systems of political thought are directed to a concentration of State-personality in a single person, either individual or collective, 59. The views of Bodin, 59. Even in Bodin, however, and also in other absolutist thinkers, there is a recognition of the personality of the People as existing side by side with that of the Ruler, 59. The terms *respublica* and *civitas* in the writings of Arnisaeus, 60.

6. Hobbes is the first thinker to transcend this dualism completely, 60. His view of the one original contract, 60. He acknowledges no rights of the People, 60; and no contract between the Ruler and the People, 60. His belief in the total sovereignty of the Ruler in all forms of State, 60. His rejection of a mixed form of State, 60. The visible manifestation of the Ruler's personality, in a single man or in an assembly, 60. The concentration of the personality of the State in this personality of the Ruler, as based on a political contract according to Natural Law, 60 The People without a Ruler is in no way a *universitas*, but only a 'multitude', 61 The Ruler as the only mind of the State, 61. The personality of the State (*persona civitatis*) is thus made the core of public law, 61. Theories which are similar, if not so logically developed to their conclusions, in Graszwinkel and Salmasius [note 159].

The relation of the theory of Hobbes to natural-law individualism, 61. The importance of his theory of the unitary personality of the State in the further development of the natural-law theory of the State, 61.

CHAPTER I: SECTION V, §15

THE NATURAL-LAW THEORY OF ASSOCIATIONS (*DIE ENGEREN VERBANDE*)

The influence of the natural-law conception of the State on the theory of other groups (1) through its theory of Sovereignty, and (2) through its theory of Contract, 62

I. GROUPS WITHIN THE STATE

(1) *The unitary or centralist interpretation*

The local communities and corporate bodies contained in the State differ generally from it in not possessing any sovereignty, 62. But the development of the theory of sovereignty none the less determined the extent to which a community-life of their own could be preserved for these bodies, 62.

In general [a centralist view prevails, that is] we find a refusal to allow that local communities and corporate bodies have a social existence of their own, 62. Reluctance to admit the natural-law origin of these groups, 63. Thus, the theory of the organic [or natural] origin of the State recognises an ascending series of groups [culminating in the State], but regards the Family as the only one of these groups which is a naturally given unit, 63. The division of the Family into the three domestic societies—husband and wife; parents and children, master and servants, 63 The Family as the immediate basis of the State, 63 Communities and corporate bodies, on the other hand, are regarded as formations within the State which are not a necessity of nature, but a creation of positive law, 63 The theory of a Social Contract is even more definitely adverse [than the theory of the natural origin of the

State] to any recognition of the State as a Whole which is organised in corporate bodies on the basis of Natural Law, 64. The result is that groups have no clearly defined sphere of rights as against either the State or the Individual, 64.

[*a*] As concerns the relation of groups to the State, the absolutist theory of sovereignty refused to admit the existence of any independent social authority other than that of the State in the domain of public law, 64 Bodin on the corporate structure of the State, 64. His distinction between *corpus*, *collegium* and *universitas*, 64. He assigns the origin of these forms of association to a period prior to the foundation of the State, 65. Their significance for the State, 65. The advantage of corporate Estates and their meetings, 65. None the less, limitations [of their powers] are necessary in certain circumstances, 66. Moreover, all corporate institutions are always unconditionally dependent on the Sovereign, 66. Their existence, their right of meeting and their corporate authority are based on the State's concession, 66. The different degrees of powers assigned [by Bodin] to different forms of corporate authority, as a result of his view of all corporations as State-institutions, 66 His classification of *collegia*, 66. The capacity for owning property not an essential attribute of corporations, 67. Delicts of corporations, and their punishment, 67.

A similar view is to be found in other absolutist writers on politics, 67. Gregorius Tholosanus, Bornitius, Arnisaeus, 67. Even the more moderate absolutists adopt the view that corporations are State-institutions, 67. Besold, 67. The denial of any inherent corporate authority by the writers on Natural Law proper, 67 Particularly by the ecclesiastical writers, 68 The rejection of any idea of the autonomy of corporations by Suarez, 68 The application of these ideas to the interpretation of customary law, 68. The State's exclusive right of taxation, 68. The transference of this centralist point of view to the sovereign Church, 68.

[*b*] As concerns the relation of groups to the Individual, there is similarly no recognition of an independent existence of associations [apart from the individuals of whom they are composed], 68 The classification of the Corporation and the Family as forms of private 'society' [i e as 'partnerships' of individuals], 68 The old [Roman-law] theory of the Corporation only applied formally and externally, in connection with deviations from the usual form of the contract of 'society' or partnership, 68. The question whether a corporate body has a personality of its own, 68. In general, a merely 'collective' view of that personality [as an aggregate or sum of individuals] holds the field, 69 This view is apparent in the explanations given of the majority-principle, and in the theories about the delicts of corporations, 69. The application of the idea of *societas*, by the ecclesiastical writers on Natural Law, for the purpose of preserving the 'Fellowship' principle in regard to commons, 69. The rights of the [mere] community and those of the corporation in the theory of Suarez, 69. *Communitates perfectae* and *imperfectae*, and further subdivisions of *communitas* [note 30].

(2) *The federalist interpretation, especially in Althusius and Grotius*

On the other hand, a federalist trend of thought is also to be found in the theory of Natural Law, which applies the general idea of a 'social contract' to associations also, as well as to the State, and thus preserves for them a common sphere of their own [as defined and secured by the terms of their particular contract of association], 70

The way for this federalist theory is prepared by doctrines about a right of resistance as belonging to the different parts of a country when the authority of the State is tyrannically employed, 70. The doctrine of Languet [i e of the author of the *Vindiciae contra Tyrannos* of 1579] about the right of provinces and towns to secede when the Ruler breaks the contract, 70 The support given to this doctrine by historical events, 70. The relations of this federalist theory (1) to the constitution of the Protestant churches, and (2) to the political institutions of Holland, Switzerland and Germany, 70

The systematisation of federal ideas by Althusius, 70. Although he holds to the idea that sovereignty is the essential attribute of the State, he recognises associations as possessing a sphere of rights of their own, 71. The difference between his theory and the theory of medieval federalism, 71 He regards the social contract as the basis of the whole system of public law, 71. Five stages of groups (the Family, the Fellowship, the local community, the Province and the State), each with its own independent authority, 71 The higher groups composed of the lower, 71 The inherent and inviolable sphere of power belonging to each of the constituent bodies, 72 The rights of resistance and secession, 72 In accordance with his general theory, Althusius constructs his system of politics 'from below upwards', 72 (1) The Family (the Household and the Kin-group), 72 (2) The 'Fellowship' in its various forms, 72 The higher groups [i e. the three which follow], as 'mixed political associations', brought under the general conception of *universitas*, 73 (3) The local community in its various forms, 73. (4) The *universitas provinciae*, 73. (5) The State, 73. *Majestas* as the one essential distinction between the State and other associations, 73. The creative force of the social contract, in regard to all the five stages of groups, 74. All through the series, the group has authority over its constituent members, though with different limits in each case, 74. Rule and obedience, 74. The general body of the ruled regarded as the true 'Subject' or owner of the community-authority, 74 The assembly representing the group is therefore treated as superior to its executive, 75. The application of the traditional [Roman-law] theory of corporations, within the framework of this theory, 75 The agreement between Althusius' system of politics and his juristic theory of groups, 75 The results of his doctrine, as regards the rights of corporations, 76.

The influence of the theory of a social contract upon other writers on Natural Law, 76. Their recognition of associations as possessing an independent common life of their own, 76. Their use of the federal scheme of Althusius, 76

The federalist theory [of groups] in the writings of Grotius, 77. His system, 77. The contract of association and the contract of government, and the other *raisons d'être* of ruling authority, 77 Grotius attains on this basis a general natural-law theory of Society at large, 77. The relation of associations to the State, 77. The basing of all groups on the idea that they are systems of relations between rights of individuals, 78. Accordingly, Grotius draws no clear line of distinction between partnership (*Sozietat*) and corporation, 78. The majority-principle regarded as the result of an agreement, 78. The rights of the members of a group *ut universi* and *ut singuli*, 78. The relation of *singuli* to the debts and delicts of the general body, 79.

(3) *The interpretation of Hobbes*

The theory of associations in Hobbes, 79 The contractual basis of all social formations, 79 The generic idea of the *Systema*, 79. A *Systemata regularia* These are divided into (*a*) *absoluta*, i e. States, and (*b*) *subordinata*, which are subject to the authority of the State, 79. The latter are divided in turn into (1) *corpora politica* and (2) *corpora privata*, 80. Another division based on the object or purpose of the 'System', 80. B. *Systemata irregularia*. Licit and illicit unions and assemblies, 80 In any case, however, it is only the mere *existence* of associations which can be based upon the principle of liberty of association, 80 No group-*authority*, of any kind whatsoever, can be made to issue from that principle, 81 All corporate authority is delegated State-authority, 81. The identification of the group and its members in relation to the State, 81. The application of these ideas to Parliaments, 81.

This point of view makes it possible for Hobbes to erect a general theory of Society, which embraces both the State and associations, without incurring any risk to his absolutist tendencies, 81. His conception of the unitary personality of the group, 81. His general theory of 'persons', 82 Representative and represented 'persons', 82. Representation of a multitude of men by a 'person', individual or collective, authorised thereto, 82 The subordinate group-personalities regarded, like the State, as *personae repraesentativae*, 82 The contrast between the monarchical and the republican constitution, as it appears in associations [as well as in the State], 83 The different effects of the unauthorised actions of a *persona repraesentativa*, according as that *persona* is *unus homo* or *unus coetus*, 83. The corresponding distinction between the delict of a single representative officer and that of a representative assembly, 83. The application of this distinction to questions of debt, 84.

The historical importance of this individualistic system of thought, in its bearing on the development of a natural-law conception of the Group-person, 84.

II. GROUPS ABOVE THE STATE

Rejection of the idea of a world-monarchy, 85. Its place is taken by the idea of a community based on international law, 85. The con-

troversy about the *societas gentium*, 85. International law as binding in the form of Natural Law, 85–86.

Particular unions of States [i.e. federations], 86. The incompatibility of a federal State with the natural-law doctrine of sovereignty, 86. None the less, corporate elements are imported into the idea of the *foedus*, 86. Grotius' distinction between contracts of confederation and organised unions, and again between unions which are 'personal' and those which have a 'real' character, 86.

III GROUPS PARALLEL WITH THE STATE

The Church

The idea of such groups is incompatible in principle with the natural-law theory of sovereignty, 87. The Church, 87 The doctrine of the independent sovereign authority of the Church, as expounded by Catholic writers on Natural Law who apply the theory of the Two Swords, 87. Other views with regard to the relations of Church and State, 88

The Protestant doctrine (*a*) According to the Lutheran view, State and Church are separate sovereign groups, of unlike origin, but under a common head, 88 The episcopal system and the theory of the three Estates, 88. (*b*) The community-principle in the 'Reformed Church' [i.e the Calvinist], 89. The people as both secular and ecclesiastical sovereign, 89.

With the development of Natural Law, it became necessary for its exponents to bring the Church into the scheme of their theory of the State, 89. [Hence we find] (*c*) the purely 'territorial' doctrine, 89 The Church, in its external legal manifestation, is regarded as a State-institution, 90. The different attempts to delimit the power of the State over religious life in the 'territorial' system of thought, 90 (*d*) Contrasted with the 'territorial' is the 'collegial' system, 90 According to this, the Church is regarded as an association within the State, based on an ecclesiastical social contract, 90 The relation of this theory to the 'territorial' system, 90 At first there is hardly an antithesis, 90. Grotius' theory of Church government, 91 His view of ecclesiastical group-authority as a *regimen constitutivum ex consensu*, distinct from the *regimen imperativum* which belongs to the State, 91. The sovereignty of the State in the ecclesiastical sphere, 91. Other representatives of the 'collegial' system, 91. Conring, 92. The rise of an antithesis between this system and the 'territorial' system, when it comes to be held [by the advocates of the former] that associations have a group-authority of their own, 92. The theory of Voetius, 92. His view that each congregation is based on a contract between the professing members, and the larger Church-group on a union of congregations, 92. The idea of a natural group-authority developed on this basis, in regard to doctrine, ritual and discipline, 92. Preservation of ecclesiastical independence as against the State, 92. The attacks on Voetius by the advocates of the 'territorial' system, 92.

CHAPTER II

THE PERIOD FROM THE MIDDLE OF THE SEVENTEENTH TO THE BEGINNING OF THE NINETEENTH CENTURY

SECTION I

THE NATURAL-LAW THEORY OF SOCIETY DURING THE PERIOD OF ITS ASCENDANCY

§§ 16 to 18

CHAPTER II: SECTION I, §16

THE GENERAL THEORY OF THE GROUP (*VERBANDSTHEORIE*) IN NATURAL LAW

I. *The vogue of Natural Law and its individualistic basis*

Supremacy of Natural Law in this period, 95 Development of a general natural-law theory of associations, 95. Individualism its guiding star, 96.

II. *The priority of the individual to the community, and the consequent views of law and property*

The priority of the individual to the group, 96 The problem of discovering a system of legal relations among sovereign individuals in the state of nature, 96. The importance of the solution of this problem in its bearing on international law and [internal] public law, 97.

As against the pure conception of Power in Hobbes and Spinoza, the dominant theory holds fast to the conception that Natural Law has the character of Right, 97 Thomasius' view of the merely 'internal' obligation of Natural Law, 98. But there is a prevalent recognition of its being externally obligatory, 98 The compatibility of such obligation with natural liberty, 98. Derivation of Natural Law from the Divine Will, or the nature of the Divine Being, 98. The sanction of Natural Law by the threat of Divine punishment, 99. Such theories, however, have no practical importance, 99. The basing of the obligation of Natural Law on the mutual claim of individuals to its observance, 99. The right of self-help, 99 Application of these ideas to international law and [internal] public law, 99

The contradiction between recognition of a natural legal obligation and denial of the existence of any community anterior to law, 100. Grotius' principle of 'sociability' is an attempt to reconcile this contradiction, 100. Civil society as the development of a sociable state of nature, 100. The consequent theory of the natural-law content of

positive law, 100. The attempts to construct a later system of 'social natural law', over and above the original system of 'pure natural law', 100.

In opposition to this line of thought there is the view, developed under the influence of Hobbes, which regards the state of nature as altogether unsocial, 101. Locke, 101. Rousseau's doctrine of the perfect liberty of the state of nature, 101. Similar doctrines in Germany, 101. The zenith attained in Fichte's earlier system of thought, 101. His derivation of Law (or Right) from the voluntary limitation of the sovereign Ego, 102. Right, it is true, can be realised only by the State, 102. But the Right which is enacted by the State is based on Reason, 102. Kant, 102. He bases Right on the categorical imperative, 102. The priority of the individual to the community, 102. The State obliged by the law of Reason as an *a priori* principle, 103. Theories of the origin of property, 103. The assumption of an original community in all things, but only in the form of a *communio negativa*, 103. The importance of this view in its bearing on private property, 103 Locke bases property in the state of nature on labour or occupation, 103 Diffusion of the doctrine of the pre-social origin of property, 103. Rousseau, 104. Justus Moser, 104. Kant, 104. Side by side with this doctrine, however, there continued to exist a theory which based property on the authority of the State, partly as a survival of older theories, and partly by developing the new idea of a contract of property, 104 Fichte's theory almost socialistic, 104.

These theories of the priority of the individual were confronted by a theory which assumed the existence of primitive society, 104. The theological basis of this theory, 104. It never attained a proper logical development, 104. Leibniz, 104. The beginnings of an historical view of social evolution, 104. Montesquieu, 104. Moser's attack on the law of Reason, 104 Other representatives of this trend of thought, 105. Herder, 105. The importance of the survival of these theories side by side with individualism, 105.

III. *The natural-law view of the source of Group-authority*

Derivation of the community [and of community-authority] from the individual in the prevalent form of natural-law doctrine, 105.

There are, it is true, some views which diverge from this prevalent form, 105 For example, among the advocates of an unsocial state of nature, we find one divergent view which is based on the assumption of the divine origin of social authority, 105. Horn, 105. Again, among the advocates of the idea of original community, we find another divergent view which is based on the assumption of a naturally given social authority, 106.

But apart from these divergent views, the original sovereignty of the individual was universally held to be the only source of group-authority, 106. In this matter, the absolutist doctrine, the doctrine of popular sovereignty, and the intermediate doctrine [of a 'double majesty'], were all agreed, 106. Rousseau in particular adopts this view, 106. It is used by Beccaria in order to attack the practice of capital punishment, 106.

By the end of the eighteenth century, it is almost an unchallenged axiom that all social authority is derived from the devolution of individual rights, 107. The comparison in Moser and Sièyes between the original formation of Society and the foundation of a company, 107. Fichte, 107. Kant, 107.

IV. *Natural Law and the idea of contract as explaining the origin of Groups*

The free act of the individual will as the only legal mode of forming a community, 107. The original social contract as a natural-law dogma, 107. Different views with regard to the transition to the social state, 107. According to the prevalent form of doctrine, both a contract of society and a contract of government served to produce that transition, 107. Modifications, 108. The theories of a single original contract [either a contract of government, or a contract of society], 108. The importance of the act of the individual will as regards the single contract of government, 108; and as regards the single contract of society, 108

Discrepant views, among those who agreed in holding a theory of contract, with regard to the motives for concluding the social contract, 108. Social instinct, or external needs, 108. But all thinkers alike attempt to find the legal basis of society in the will of individuals, 108. This is true even of Kant, 108. The universal tendency to emphasise the free act of will as the basis of the social condition, 109.

Different views with regard to the actual existence of the original contracts, 109. The original contracts as historical facts, 109. Various modifications of this view, 109. In opposition [to this historical view] we find Kant working out a purely idealistic interpretation of the political contract [i.e. he holds that it is an *a priori* assumption, rather than an historical fact], 109.

The individualistic point of view with regard to the continuing force of the original contracts, 110. Doubts concerning the bindingness of majority-decisions, 110. The fiction of new contracts to explain the obligation of later generations, 110. Entry into the State and exit from it, and the formation of separate autonomous bodies, 110. The extremest development of these ideas in Fichte [note 88]

The theory of a social contract, developed first in connection with the State, is applied to all human groups, 110. The difficulty of applying the theory to the Family, 111. Marriage as a contract of partnership (*Sozietat*), 111.

Revolts against the theory of contract in this period, 111. Ineffectual attacks against it, based on theocratic ideas, 111. In particular, Horn's attack, 111. The survival of the old view of the natural origin of the State, 111. The precursors of the historical and organic conception of the State, 111. Revolts based on a more realistic treatment of the State, 111. Hume, 111.

V. *The natural-law view of the purposes of Society and its various Groups*

The purposes of a common life based upon such foundations could only be individual purposes, 111.

The purpose of the State, in particular, 112. General agreement that the sphere of power of any community is limited by its purpose, and therefore that the sphere of the authority of the State is limited by *its* purpose, 112. None the less, there were fundamental differences of view in regard to the way in which the relation between society and the individual ought to be defined, 112. Theories which make the attainment of the community-purpose depend on the complete self-surrender of the individual, 112. Their extreme development in Hobbes, 112. Spinoza's proviso in favour of intellectual and moral liberty, 112. The apparent security provided by Rousseau for the inviolable rights of man, 112. The prevalent form of theory, which makes the individual pool only a part of his original rights, 113. Protection against the abuse of social authority, 113. Recognition of only *limited* social purposes, 113. Limitation of the State's object to the provision of external and internal security and the realisation of a system of legal relations, 113. Particularly in Locke, W. von Humboldt and Kant [note 110]. The growth of the theory of the Rights of Man, 113. Innate and acquired rights, 113. The theory used to defend freedom of conscience, especially by Thomasius, 113. It is also used, at the same time, in the cause of economic liberty, especially by Locke, 113. Doctrinaire elaboration of the theory in Wolff, 113. It develops into a fixed system, and takes the shape of constitutional 'declarations', 114.

But opposite consequences could also be drawn from the basic tenet of individualism, 114. Such opposite consequences especially drawn in the writings of Fichte, 114. Socialistic and communistic movements based on the individualistic point of view, 114

Occasional and sporadic efforts to recognise that Society, like the individual, has its own life-purpose, 114.

VI. *The natural-law view of the Being of Groups*

The natural-law conception of the *Being* or essential nature of groups [as distinct from their *origin* and *purpose*, which have been treated in IV and V], 114 The conclusions drawn from individualism, 114. All groups regarded as mere systems of legal relations between individuals, on the analogy of the partnership which is based on individual rights, 115. None the less, there is a clinging to the conception of group-personality, 115 General adhesion to the views of Hobbes, 115.

Horn alone rejects *in toto* the conception of Group-personality, 115. His views in detail, more particularly as regards the 'Subject' of State-authority, 115. The difference between his theory of monarchies and his theory of republics, 116. In opposition to this theory of Horn, thinkers in general recognise the community as a 'Subject' of rights, 116. They only differ in their interpretations [some regarding the community

as only being a 'Subject' when it has a Representative, and others regarding it as being itself 'collectively' a 'Subject'], 116.

The principle of Representation in the absolutist systems, 116. The principle of Collectivity used to supplement this principle, 116. Particularly in non-monarchical corporate bodies, the idea of a collective unity of persons is made the basis of the position of groups as 'Subjects' of rights, 117. The majority of the writers on Natural Law, however, start from the 'Fellowship' idea of a collective unity of persons, 117. But they use the principle of Representation to supplement this idea [just as, conversely, the absolutist writers use the principle of Collectivity to supplement their principle of Representation], 117.

The views of Pufendorf: the persona moralis

Pufendorf combines 'collective' and 'representative' unity in his conception of the *persona moralis composita*, 118 The effect of the contract of association in constituting such a *persona*, but the need of its being supplemented by a further contract of government, 118. Pufendorf's philosophical explanation of the general idea of *persona moralis*, as embracing both group-persons and individual persons, 118. *Entia moralia* as the units in a system of law, 118. *Personae morales* regarded as *entia moralia ad analogiam substantiarum concepta*, 119. The *persona moralis simplex*, 119. The *persona moralis composita*, 119. This formal unity [of the composite moral person] has no real social Whole corresponding to it, 120. Pufendorf thus reverts [in spite of his attempt to combine them] to a separate treatment of 'representative' and 'collective' unity, 120.

How Pufendorf's new idea is treated in the writings of his successors, 121. The conception of *persona moralis* is narrowed down, 121. It becomes merely a technical term in Natural Law to designate a Group-person, 121. The conception of *persona composita* disappears, 121. The relation between 'collective' and 'representative' unity among Pufendorf's disciples, 121. The theory of Hert, 122. Generally, he ascribes any living Group-personality to the presence of a representative authority derived from the State, 122. For the rest, [he holds that] there is a variety of cases in which the conception of 'person' and that of 'man' are not co-extensive, 122. Here he introduces the ideas (1) *de uno homine plures sustinente personas*, and (2) *de pluribus hominibus personam unam sustinentibus*, 122. He also distinguishes cases of a unity of many men in one person according as they are based (1) on legal fiction, or (2) on contract, 123. But he has no effective conception of a corporate body, 123. In Gundling and other writers, we find the personality of the State identified with the representative personality of the Ruler; but otherwise they interpret the *universitas* in strict terms of 'collective' unity [without reference to any 'representation'], 123.

This contrast [between the State, which becomes a single 'person' through its 'representative' Ruler, and the ordinary *universitas*, which remains merely a 'collective' person] is accentuated by being interpreted as an example of the general contrast between 'unequal' and

'equal' *societates*, 123. 'Collective' unity in the *societas aequalis*, and 'representative' unity in the *societas inaequalis*, as expounded, more particularly, in the writings of J. H. Boehmer, 123. The more perfect unity of the 'unequal Society', 123 The exaltation of the State, and the idea of a fundamental distinction between it and the corporate body, based on this contrast [of the 'unequal' and the 'equal' Society], 124.

The atomistic conception of the nature of associations in eighteenth-century Germany

Disintegration of the natural-law conception of Group-personality, 124. The conception of the 'moral person' ceases to be used, except in interpreting 'Fellowship' systems of connection, 124. Even in this limited sphere, the conception is only used in regard to the external relations of a society, while its internal rights and duties are dissolved into mere relations of individuals to one another, 124 Thus even the State itself is treated as being a *persona moralis* only at international law [i.e. in regard to its external relations], 125. Disappearance of any distinction between the corporate body [Korperschaft] and the mere society [Gesellschaft], 125. Isolated tendencies in an opposite direction, 125. On the whole, however, the thought of the eighteenth century strictly adheres to an 'atomistic' view, 125. Wolff, 125. Daries, 125. Nettelbladt and his detailed theory of *societas*, 126. Achenwall and his essentially similar view, 126. Scheidemantel's approach to the idea of the 'composite person', 126. Controversy in regard to the majority-principle, 127. The gradual victory of the view that unanimity is essentially necessary, 127. This means the final dissolution of any idea of group-unity [because it lays the real emphasis on each unit of the group], 127. A. L. von Schlozer flatly reduces 'collective' unity to a mere sum of individuals, 127. His theory of sovereignty [note 186]. The common will as the sum of individual wills, 127 C. von Schlozer takes the same view of the common will and the majority-principle, 127. Hoffbauer, 127. W. von Humboldt even demands legal recognition and enforcement of this [atomistic] point of view, 127.

English and French theory in the eighteenth century: Locke and Rousseau

The conception of the collective person as it appears in the English and French theory of popular sovereignty, 128. Here there is no distinction between 'equal' and 'unequal society', 128. The search for a 'Subject' of group-rights [not in a 'Representative person', but] in the associated community itself, 128. The system of Locke, 128. His derivation of the majority-principle from Natural Law, though he also maintains that the principle has a foundation in contract, 128. The theory of Rousseau, 128. He elevates the collective unit into a living Group-person, 128. This real Group-being, regarded as a *personne morale*, is placed by Rousseau on the same footing as an individual externally, and given the position of 'Subject' of State-authority internally, 129. But Rousseau remains in the trammels of an individualistic conception

of the Group-person, 129. While he distinguishes *volonté générale* from *volonté de tous*, he does not recognise any real common will, 129. He bases the majority-principle on a previous unanimous agreement, 129. The double rôle of the individual, as both partner in Sovereignty and subject to it, 129. The sovereign moral person co-extensive with the assembly of all, 130. Rousseau excludes representation altogether, 130. He has no conception of an 'organ' [through which the people acts], 130. His artificial interpretation of the governing body as a secondary 'person' created by the primary sovereign 'person', 130. But the governing body [though thus regarded by him as a 'person'] is also [like the People itself] merely a collective unit, 130.

The influence of Rousseau's view on the natural-law theory of Group-personality, 130. Its transformation into a popular form in France, more especially by Sieyès, 131. Re-introduction of the idea of Representation, 131.

Fichte and Kant

The reception of Rousseau's theory in Germany, 131 The advocates of the sovereignty of the Ruler adopt only some of its elements, 131. Fichte, on the other hand, accepts it as a whole, 131. But he shows a still sterner individualism, 131 He regards men as being partners in sovereignty and free individuals, 131. The State as a single body, 131. The assumption of a real Whole, as a contracting party already present at the time of the contract of association, 132. Justification of this assumption, 132. The comparison of the State to a tree, 132 The life of the Whole as the aggregate of the lives of the parts, 132. Fichte's juridical person is thus no real personality, 133 He does not apply the conception of person to the State at all, 133. He bases international law on the relations between individual citizens [of different States, and not on the relations between States themselves], 133 Fichte's attempt to discover a common will operative in the internal life of the State, 133. His rejection of the majority-principle, 133. He regards the common will as realised by the assembly of all, but he gives some limited recognition to the principle of representation, 133. He does not attain the conception of a corporate 'organ', 133 In his later writings, he approaches an organic view of society, 133 Kant, 134 Fundamentally, he limits the conception of personality to the individual, 134. At the same time, he uses the expression 'moral person', 134 He applies it, for example, to States, in the sphere of international law, 134. And also to the various holders of authority, in the sphere of internal public law, 134. His conception of the three powers [legislative, executive and judicial] as moral persons, 134, and of the State and the People as similar persons, 134. His view of the common will as the sum of individual wills, 134. He bases the majority-principle, and the theory of representation, on contract, 134. But his individualism is modified by his introduction of the conception of the *homo noumenon*, as contrasted with the *homo phaenomenon*, 134–135.

GENERAL RETROSPECT

General view, in retrospect, of the disintegration of the civilian and canonical doctrine of corporations by the theory of Natural Law, 135. The introduction of the 'moral' person in lieu of the 'fictitious' person, 135. But, in spite of this advance, individualism prevents any recognition of groups as possessing a living unity of their own, 135. In spite of the use of organic analogies, there is a purely mechanical conception of society, 136. The analogy of the machine gains ground, 136.

The opponents of the individualistic interpretation of society start from the conception of a social Whole, but they fail to attain the conception of a personality immanent in that Whole, 136. Justi [note 251]. Mevius and S. de Cocceji [note 252]. Leibniz [note 253]. Frederick the Great [note 254]. Herder [note 254].

CHAPTER II: SECTION I, §17

THE NATURAL-LAW THEORY OF THE STATE

I. *General view*

The natural-law theory of the State which is based on the general natural-law theory of Society at large can be divided into (*a*) the theory of natural public law (*jus publicum universale*), and (*b*) political theory (*Politik*), 137.

It includes (1) the application to the State of the general idea of *societas*, as already described in the previous subsection, and (2) the various problems arising from the attempt to combine that idea with the idea of sovereignty, 137. The fundamental antinomy between the traditional theory of sovereignty and the conception of the Law-State which is immanent in the theory of Natural Law, 138. To solve the antinomy, thinkers (1) assume a reserved sovereignty of the individual, 138; (2) recognise that groups have their own systems of group-rights, 138; and (3) divide the personality of the State into a number of 'persons', 138. The natural-law conception of the personality of the State is prevented by its individualistic basis from contributing to the solution of the antinomy, 139. The result is a continuance of the controversy about the 'Subject' of sovereignty, 139 The value and defects of the formal natural-law conception of State-sovereignty, 140. Rejection of the theory of 'double majesty', 140. Transformation of [Grotius'] theory of the *subjectum commune* of 'majesty', 140. The controversy thus confined to a dispute between the two extremes of the pure sovereignty of the Ruler and the pure sovereignty of the People, 140.

II. *The theory of the Sovereignty of the Ruler*

Immediately, the victory lies with the theory of the sovereignty of the Ruler, 141.

The State, as the 'Subject' of supreme authority, is identified with the 'representative' personality of the Ruler, 141. The application of this idea to different forms of State, 141. The interpretation of 'the Ruler' in a democracy, 141.

The possibility of a collective personality of the People, as distinct from the Ruler, 141.

The rejection of this possibility by the absolutist writers on Natural Law, 141. The stricter school of thought regards it as inconceivable that there can be any system of public or constitutional law which juridically obliges the sovereign, 141. The adherents of this school of thought, 142. In Germany a more moderate school holds the field, 142. Horn recognises certain limitations on absolute monarchy, 142. So, especially, does Pufendorf, 142. True, he attacks the idea that the community of the ruled can have rights as against the Ruler, 142. But his theory allows limitations on the Ruler arising from differences in the *modus habendi* of majesty: thus he draws a distinction between the patrimonial State and the normal monarchy in which the Ruler for the time being only enjoys the usufruct of authority, 143 The compatibility of an *imperium limitatum* with the full Sovereignty of the Ruler, 143 The nature of the assent of the People, or the Estates, which is involved in such a case, 143. That assent is only a *conditio sine qua non* of the volition of the monarch, which is the real expression of the will of the State, 143 The actual object of such volition can never be imposed on the Ruler by a will alien to his own, 144 The great success of this theory of Pufendorf, 144. The followers of his theory, 144 The extremer form which it assumes in Boehmer, 144. Its modification by other writers, in the direction of an extension of constitutional limits, 144.

The recognition, in the writers on Natural Law who incline to constitutionalist views, of a collective personality of the People as continuing to exist over against the Sovereign, 144. They base this view on the theory of Contract, 145. They measure the rights of this collective personality of the People (1) by the standard of the original contracts, and (2) by that of express constitutional provisos, 145 Huber on the constitutional State, 145. He believes in the unity of majesty, in spite of any limitation by the rights of the People, under *all* forms of constitution, 145. The *leges fundamentales* regarded as contracts, 146. The People regarded as a *universitas*, which confronts the personality of the State embodied in the Ruler, 146 Huber's use of this system of ideas to combat popular as well as monarchical absolutism, 146 His self-contradictory application of the system to democracy, 146. A similar theory used by other writers to justify the rights of the territorial Estates in Germany, 146. Leibniz introduces the idea of sovereignty as being only 'relative', 146 The idea of a collective personality of the People in the followers of Pufendorf, 147. The gradual recognition of popular rights even among the advocates of the sovereignty of the Ruler, 147. The approach to a theory of popular sovereignty in Wolff, 147. And similarly in Nettelbladt, 148. The idea of a separate 'moral personality' as belonging to the People, and also to the assembly which represents

the People, 148. The personality of People and Estates as conceived by Hoffbauer, 148. Even among those thinkers who lay a greater emphasis on the sovereignty of the Ruler we find the view propounded of a constitutional State, in which Ruler and People are related to one another as contracting parties, 148. Daries, Achenwall, Scheidemantel, Schlozer, 148. The revolutionary results which follow in the event of a breach of contract, 148.

The controversy about the relation between People and Ruler is connected with the controversy about the various possible forms which the ruling 'Subject' may assume, 148 The problem arises of the possibility and value of a mixed form of State, 148.

III *The theory of Popular Sovereignty*

The theory of popular sovereignty, 149. It continues to survive in England, and the theory of a contract of government continues to be held in connection with it, 149 The superior position of the People in this contractual relationship [between People and Government], 149. Sidney, 149. Locke, 149

Rousseau breaks away from the idea of a contractual relationship between People and Ruler, 149 He bases an unlimited and illimitable popular sovereignty on the one foundation of a contract of association, 149 He regards the appointment of a governing authority as nothing more than a commission which is always revocable at will, 150. He banishes entirely the idea of a State based on law and a constitution, 150. None the less, he fails to escape from dualism in his conception of the 'Subject' of political rights, 150. His attitude to existing law, 150.

The development of the revolutionary theory of the State in the framework of Rousseau's system of ideas, 150. The doctrine of popular sovereignty modified as a result of greater attention to actual facts, 150. Approach to the idea of the constitutional State, through accepting a system of popular representation or the fact of an independent governing authority, 150. Thus Fichte limits the sovereignty of the People by an obligatory system of constitutional law, 151. He believes in the necessity of transferring 'absolute positive right' to a magistrate, 151. He regards the People as bound to reconstitute itself into a 'community' if it seeks to exercise its reserved rights of sovereignty, 151. The fixing of periodical assemblies for this purpose, in smaller States, 151. In larger States, the election of 'Ephors', with 'absolute negative power', who can bring the whole system of a government to a standstill, and then summon the people to meet as a 'community' for the purposes of sovereign decision, 151. The right of resistance in certain cases, 152. The unity of the 'Subject' of political rights on this theory, 152. The reasons for the disappearance of his earlier idea of the personality of the State in Fichte's later theory, 152.

Popular sovereignty in the theory of constitutionalism, 152. Montesquieu's adhesion to English theory, 152. Popular sovereignty, however, recedes into the background, 152. In fact, the whole conception of sovereignty (like the conception of the personality of the State) dis-

appears altogether in the course of Montesquieu's development of the idea of the constitutional State, 153. Frederick the Great's attitude to popular sovereignty [note 94]. Justi's attempt to unite the theory of constitutionalism with the idea (which is required by the conception of the 'body politic') of a unity of power and will, 153. Popular sovereignty in Kant, as an 'idea of Reason', 153. His recognition of a sovereignty of the Ruler based on historical grounds, 153. His ideal sketch of a constitutional State, 153.

The approximation [of constitutional theories which start from the idea of the sovereignty of the People] to the theory of the constitutional State which proceeds on the assumption of the sovereignty of the Ruler, 153. Here, again, the question is raised of the possibility of a mixed form of State, 153.

IV. *The theory of the Mixed Constitution*

The question inherited from the Middle Ages, 154

Thinkers who adopted the theory of the sovereignty of the Ruler rejected the mixed form of State, as a result of their strict insistence on the conception of sovereignty, 154. This negative attitude, however, caused difficulties when these writers had to deal with actual constitutions based on historical development, 154. Attempts to find a solution, 154 The triumph of Pufendorf's doctrine of the irregularity of all mixed forms, 154. His successors, 155. Modifications of the conception of irregularity, 155. Otto, 155. Titius, 155.

The idea of an undivided co-partnership among a number of 'Subjects' of majesty, 155. The way for this idea prepared by Besold, 155. Its application to the German constitution, 155. Huber's serious attempt to interpret the constitutional State along these lines without abandoning the idea of the unity of State-authority, 155 His theory of the possession of majesty on a system of joint ownership [*zu gesamter Hand*], 156 The different forms assumed by such joint ownership of governing authority, 156. Similar views propounded by other writers, 156. The defects of their theories, 156. The recurrent tendency to slip back into the idea of a division of rights of majesty, 156 Achenwall, 157.

The survival of the theory of divided sovereignty, 157 This theory does not permit any fruitful recognition of that unitary sovereignty of the State which lies behind all division, 157. Leibniz's distinction between the 'substance' and the 'exercise' of sovereignty, 157.

The combination of the theory of the mixed form of State with the demand for a *qualitative* division of powers in the doctrine of constitutionalism, 157. The importance of division of powers in judging the form of a State, 157. Locke, 157. Montesquieu, 158. The mixed form of State as a constitutional ideal, 158

The idea of division of powers as applied in the theory of popular sovereignty, 158. The contradiction between popular sovereignty and the constitutionalist system, 158. Rousseau accordingly attacks division of powers, 158. His theory, however, by separating the legislative and the executive powers, still preserves the principle of a division of powers,

158. But a closer approach to the idea of separation of powers may be found among the later radical advocates of the doctrine of popular sovereignty, 159.

As the theory of constitutionalism wins ground, the doctrine of Montesquieu triumphs, with its combination of the conception of the mixed constitution and the principle of division of powers, 159. After the middle of the eighteenth century, we find thinkers recognising the mixed form of State, with a division of sovereignty, even when they still adhere to the idea of the sovereignty of the Ruler, 159. The diffusion of this theory in Germany, 159. Kant's explanation of the principle of division of powers as a rule of logic, 159.

V. *The contributions made by the natural-law theory of the State to the development of public law*

The dissolution of the conception of sovereignty, and the disintegration of the personality of the State, as the ultimate results of the natural-law theory of public law, 159 But this theory, thanks to its formal conception of personality, also leads to progress, 160.

(*a*) The idea of the continuity of political rights and duties, in spite of changes in personnel and territory, and even of alterations in the form of the State, 160. Continuity in spite of the division of a State, or of a union of States, 160.

(*b*) The representative position of the Ruler as a 'Subject' of rights distinguished from his private position, 160 The application of the principles of the law of corporations to the volition and action of a representative collective-person [i e a representative assembly], and thus to the volition and action of the State, 160 The two 'persons' of the one Ruler, 161 Separation of his public-law from his private-law sphere, 161. His 'government' acts and his 'private' acts, 161. The treatment of the official acts of public officials as State-acts, 161 The successor in title obliged by the acts of his predecessor, 161. This idea, however, is often combined with ideas which are simply drawn from the law of private inheritance, 161. Representation of the personality of the State by the 'illegitimate' ruler during an interregnum, 161.

(*c*) A clear line of division is drawn between State-property and the private property of the Ruler, 161. The ownership [of the former] vested in the State, 161. The Ruler limited in its use, 161. Controversies in regard to the distinction of the different species of State-property, 161. The position of the demesne [*Kammergut*] in territorial principalities, 161. Differentiation between the private property of the State and its public-law authority over the State's territory, 162. The intermediate idea of the State's *dominium eminens*, 162.

CHAPTER II: SECTION I, §18

THE THEORY OF CORPORATIONS IN NATURAL LAW*

I. ASSOCIATIONS CONTAINED IN THE STATE

The general basis of the natural-law theory of associations, as contrasted with the traditional theory of corporations [in the civilians and canonists], 162. The different conclusions attained [in natural-law theory], according as unitary or federal tendencies predominate, 162.

(1) *Divergence of centralist and federalist views*

The natural-law grading of associations, 163. The inclusion of all groups under the rubric of *societas*, 163 The question whether intermediate groups have a natural existence or depend on artificial creation, 163.

(*a*) Predominance of the centralist tendency, 163 The Family and the State as the only groups existing by Natural Law, 163 The local community regarded as a stage preliminary to the State, but as becoming merely a part of it when once the State is constituted, 163. The 'Fellowship' as a *societas arbitraria*, 163 The rights and duties of corporations treated in connection with the theory of the position of subjects (*subditi*), 164. Accentuation of the centralist tendency in theories based on the teaching of Hobbes, 164.

(*b*) On the other hand, we find a federalist view in Germany, 164. The natural-law character of associations, 164. The theory of a natural articulation of human society into groups, especially in Leibniz, 164. Recognition of the Corporation and the State as co-equal, 164. The fullest development of this theory to be found in Nettelbladt, 164. Systems similar to his, 165

(2) *The relation of the Corporation to the State*

(*a*) *Views inimical to Corporations.*

Refusal to recognise associations as having a basis in Natural Law results in their not being allowed any sanction in Natural Law, 165. The result of that, in turn, is that they are not allowed any sphere of rights exempt from the State, 165 In connection with the unhistorical outlook of the period of Enlightenment, we find the very existence of the Corporation called in question, 165. This negative view is used by

* This subsection is closely analogous to § 15 above That subsection dealt with the natural-law theory of Associations from 1500 to 1650 this subsection deals with the natural-law theory of Corporations from 1650 to 1800 Like § 15, the present subsection is arranged on a scheme by which separate consideration is given (1) to groups within the State, (2) groups above the State, (3) groups parallel to the State.

the State to attack the existing social system of Corporations and Estates, 165.

At first, the absolutists only demand a limitation of corporations, 166. The exaltation of the State's suzerainty over corporations, 166. The demand that the formation and meeting of groups should receive the assent of government, 166. The right of the State to supervise groups and to co-operate in their action, 166. The right of the State to abolish or transform groups, on grounds of public well-being, 166. Schemes for ideal States, with a mechanical and rationalistic articulation of the body politic [Spinoza and Hume], 166 and n. 14

The struggle to annihilate corporations, after the middle of the eighteenth century, especially in France, 166. Turgot's extreme theory, 166 Rousseau's refusal to admit any idea of the corporative organisation of society, 166 The abolition of all particular societies regarded as the aim to be attained, 166 The influence of this theory on the Revolution, 166. Its application in the confiscation of ecclesiastical property, 167. The development of new self-contradictions in revolutionary theory, as the result of its recognising the necessity of intervening groups, 167. Along with this recognition, however, there is still a steady rejection of the old conception of the corporation, 167 Sieyès, 167

Rousseau's ideas in Germany, 167. Modified application, 167. The Church regarded by Justi as the only corporate element [n. 26]. Scheidemantel's conception of public and private societies as State-institutions, 168. Fichte substitutes the conception of the State-institution altogether for that of the Corporation, 168 The factor of the State-institution in the theory of Kant, 168 His confusion of 'corporation' and 'foundation', 168. His theory of the unlimited power of the State in regard to corporations, 168. The dissolution of 'moral bodies' regarded by him as a postulate of the law of Reason, 169

(*b*) *Views favourable to Corporations: especially in the theory of Nettelbladt.*

But ideas still continue to survive in the natural-law theory of Society, which prepare a renascence of the liberty of corporations in a rejuvenated form, 169 The natural right of associations to exist, regarded as a consequence of the theory of the Social Contract, 169.

A natural liberty of association is recognised in principle even by the opponents of the independence of corporations, following the lines already suggested by Hobbes, 169. Pufendorf's doctrine of associations, 169 All groups other than the Family are posterior to the State, 170. *Corpora privata* and *publica*, 170. The latter only become *corpora legitima* by permission of the State, 170. The group-authority which they exercise derived from the State, 170. The results of this dependence, 170. The State a body composed of other bodies which are its 'members', 170. The use of the conceptions of *societas aequalis* and *inaequalis* to attain similar results, 170. Hert explains the relation of the corporate body to the State by basing it on the distinction between the *societas aequatoria* and the *societas rectoria*, 170. J. H. Boehmer's formulation of this new theory of corporations, 171. He limits the natural principle of

liberty of association (1) by holding that associations have no separate group-authority of their own, and (2) by subjecting them [in a special degree] to the authority of the State, 171. Boehmer's theory of the State's suzerainty over corporations, and of the various rights to control their liberty which it involves, 171. The State's right to prohibit associations, and to require them to apply for its consent, 171. Erection of *collegia publica* by the State, 171. Its supervision of *collegia privata*, 172. No corporate right of self-legislation, self-jurisdiction, or self-administration, 172. Customary rights, municipal autonomy, by-laws [note 47]. Rights of taxation [note 49]. Boehmer rejects the conception of corporate office, 172. He leaves corporate privileges in a defenceless condition, 172. He delivers corporate property into the hands of the State, 172.

The rights of corporations assigned to the sphere of private law, on the ground of the distinction between *societas aequalis* and *inaequalis*, 172. Boehmer's elaboration of this point of view, 173. Its adoption by Titius, 173.

The natural-law theory of the contract of society is brought into line with the civilian theory of corporations, 173. The antithesis of *societas aequalis* and *inaequalis* thus comes to be connected with the antithesis of *societas* and *universitas*, 173 Huber's theory of *universitates*, 173 *Certum regimen* considered as the attribute of the *universitas* in contradistinction to the *societas*, 173. This leads to the view that confirmation by the State is the logical differentia of the *universitas*, 174 Huber's view of organised group-authority as exercised in the name of the Sovereign, 174. Similar theories in other writers, 174. On the whole, however, the natural-law doctrine seeks to attain a homogeneous theory of all 'societies', by eliminating the distinction between *societas* and *universitas*, 174.

The result of this attempt is often to produce a favourable attitude to the independence of corporate bodies, 175. Leibniz assumes the existence of an inherent social authority in such bodies, 175. Wolff takes a similar view, 175. Autonomy and jurisdiction regarded as the essential rights of a society, 175. The State's suzerainty over corporations held to be merely a part of its general sovereign suzerainty, 175 Other exponents of this point of view, 175.

The freedom of the corporate body in Nettelbladt's system of jurisprudence, 175. His recognition of the inherent natural rights of societies, 175 His view of the origin of societies, 175 He allows acquired as well as inherent rights, 176. *Potestas* and *regimen societatis*, 176. The different 'Subjects' of group-authority, according as societies differ, 176. The transference of group-authority to others, 176. *Imperium* as a part of all group-authority, 176. The content of group-authority, 176. Nettelbladt explains the distinction between *societas aequalis* and *inaequalis* by differences in the 'Subject' of group-authority [and not by the presence or absence of group-authority, which he regards as always present], 176. The internal rights of corporations, considered as *jura socialia societatis*, 177. Nettelbladt's application of these principles to the problem of the relation of corporate bodies to the State, 177 Various modes and forms of this relation, 177. The five main species of 'societies', 177. Particu-

larly the fifth and last species—that of *societates privatae in republica*, 177. Their creation, 178. Their social authority, 178. The rights of the sovereign in respect of them, 178. The possibility of their being exempt, or privileged, 178. But it is also possible, conversely, for the political sovereign to possess not only political, but also social authority over such societies, 178. In such a case, there is need for a clear distinction between his political and his social authority, 178.

Achenwall has fundamentally similar views, though he does not attain the same logical development of the theory of *societas*, 178. Hoffbauer, 178. His views on the right of citizens to form unions, 179. We also find liberty of association vindicated against the State as a fundamental right even by the sternest of individualists, 179. A. L. von Schlozer, 179. W. von Humboldt, 179.

Simultaneously, there is also a reaction, based on historical grounds, against State-absolutism and its enmity to corporations, 179 The recognition of the necessity of independent associations in the State, 179. Mevius [note 90]. Montesquieu's doctrine of the importance of privileged corporations as a defence against despotism, 179 Justus Möser's fight on behalf of the liberty of corporations, 179 His historical disquisitions on towns, guilds and leagues (the Hansa); on fraternities and crafts; on the territorial constitution [in the German principalities] and the growth of territorial Estates [note 92]. The political lessons which he draws from these data, 180 His defence of autonomy, 180. His proposals for new social formations on the 'Fellowship' model, 180.

(3) *The natural-law conception of the internal nature of Corporations, as affected by the fact of their inclusion in the State*

The natural-law conception of the internal nature of the corporation is a theme which can only be treated here from one particular angle: we shall only enquire how far the general conception of the nature of groups was affected or modified when the fact of their inclusion in the State came to be taken into account, 180. Two opposing tendencies, 180.

(*a*) *The Corporation as an Institution* (Anstalt)

The 'institution' view, which is connected with the basing of a society's corporate rights on the existence of a Ruling authority imposed upon it *ab extra* and *de supra*, 180.

The view prepared by a line of theory developed in connection with Hobbes' doctrine, 181. The importance of the 'institution' element as the determining factor in the theory of Pufendorf, 181. But a 'Fellowship' view still remains concurrently active in his theory, 181. The clearer emergence of a 'partnership' [or *societas*] point of view in Pufendorf's successors—Thomasius, Treuer and Titius, 181 and note 99. And, particularly, the obliteration of any distinction between partnership and corporation in Gundling and Hert, 182.

Huber's clear-cut conception of the corporation, following the lines of the traditional [Roman-law] theory of corporations, 182. His differentiation of the corporation from the State and the Family; from the

ordinary society or community; from 'institutions' without a constitution of their own, and from collegiate magistracies with no specific purpose, 182. His combination of the principle of a collective Group-personality with that of the State-'institution' to produce the conception of the *universitas*, 182. His distinction of *societas* and *collegium*, particularly with reference to the majority-principle [note 108]. Similar views in Schmier and in other writers, 183 and note 110. The upshot of such views is that the corporation is treated as being a 'Fellowship' from the point of view of private law, and a State-'institution' from the point of view of public law, 183.

A similar result is attained, on an exclusively natural-law basis [and without any reference to the traditional civilian and canonist law of corporations] by J. H. Boehmer and his successors, 183. Development of the rights of corporations from the conception of the *societas aequalis*, regarded as a society without any social authority, 183. This is supplemented by the idea of the State-'institution', 183.

The 'Fellowship' principle could be applied when it was assumed that an 'equal society' might possess social authority, or, again, when it was admitted that an 'unequal society' could be created by contract alone [without State-intervention], 183 But even on this basis we find *public* bodies, e.g. local communities, treated as merely State-'institutions', 183.

The State-'institution' point of view pressed to its conclusion in the theories inimical to corporations which originate in France, 183. Here there is no distinction between corporations and simple 'foundations' [*Stiftungen*], 184. Turgot [note 116]. Scheidemantel [note 116]. Kant, 184. W. von Humboldt, 184 and note 118.

(*b*) *The Corporation as a Fellowship* (Genossenschaft), *especially in the theory of Nettelbladt.*

The 'Fellowship' point of view, as it appears in the form of natural-law theory which explains the legal position of corporations as arising from a voluntary contract of society, 184.

To some extent, this is the inevitable result of the general natural-law theory of society, 184. The recognition of the 'Fellowship' group as being a 'Subject' of rights which, though it may be imperfect, is none the less, so far as it goes, independent [i.e. is inherently a 'Subject', and does not owe that position to the State], 184. The *societas* as a moral person in the theory of Huber, 184. In Pufendorf's type of theory, purely 'collective' persons are also recognised, 184. The *societas aequalis* as a moral person in the theories of Hert and Boehmer, 185. The imperfection of the 'collective' person constituted on this sort of basis, 185. It is, at bottom, only a case of the 'joint hand', 185.

The 'Fellowship' as possessing the full rights of a corporate body on the basis of a contract of society, 185. It is presupposed, on such a view, that the contract can produce a social authority, 185. The attempts to justify this view in Germany, and especially that of Wolff, 185. The development of this doctrine by Nettelbladt, and his application of it to

positive law, 185. He bases the internal rights of corporations upon a foundation of contract, 186. He explains social authority as a sum of rights of individuals, 186. The exercise of this authority by all the individual members, except in so far as it has been transferred by contract into other hands, 186. Majority-decisions and the acts of representatives, 186. Alterations in personnel through the reception of new members by means of a new contract, 186. The exclusion of members by the same means, 186. The appointment of officers of a society, 186. The *persona moralis* thus constituted, 187. The elaboration of these ideas in connection with both natural and positive law in Nettelbladt's scheme of *Jurisprudentia socialis*, 187. The matters dealt with in this scheme, 187. (1) The theory of corporate acts or decisions, 187. The majority-principle and *jura singulorum* in other writers on Natural Law (Wolff, Daries, Achenwall, Hoffbauer, C. von Schlozer) [note 139]. (2) Nettelbladt's account of the things which may be the objects of corporate ownership, 188. The *dominium solitarium* of the *societas*, 188. *Res societatum patrimoniales* and *res societatum in specie sic dictae*, 188. The application of these categories in the field of positive law, 188. (3) *Leges societatum*, either as *leges conventionales*, or as *leges proprie sic dictae*, 189. *Statuta universitatis* and 'observances' in the field of positive law, 189. (4) The legal proceedings of corporate bodies, considered as *negotia publica*, or as *privata*, 189 (5) *Obligationes societatum obligationes singulorum* and *obligationes societatis*, 189. Obligations *ex delicto* on the part of a *universitas* exist, according to Nettelbladt, only at positive law, since a corporate body is naturally and inherently incapable of a delict, 189. But a capacity for delict is recognised by most of the writers on Natural Law, 190. (6) Nettelbladt's theory of the *jura singulorum*, 190. The classification of these *jura*, 190 Application of the theory of such *jura* in the field of positive law, 191. (7) Possession and quasi-possession by societies, 191. The acquisition and loss of possession as against a *universitas*, 191. (8) *Remedia juris in applicatione ad societates*, 191.

This natural-law theory [of Nettelbladt] may be considered as a reaction of the German conception of 'Fellowship' against the foreign conception of the corporation, 191. But he has no conception of the existence of a substantive Group-being, 192.

The restoration of the German conception of the 'joint hand' by the school of Natural Law, 192. The fusion of individual spheres in a common sphere, 192. The application of the conception of the *persona moralis* even to mere cases of the 'joint hand', 192. Its use in reference to the position of the family-community, 192. Its extension by Nettelbladt to broader family-groups—the aristocratic 'House' and the House-property belonging to 'the line', 193 The organs and parts of a group regarded as distinct moral persons, 193. The union of different 'Subjects' in a [supposed] moral person in the cases of partnership for profit, co-ownership and other legal relations involving common rights and duties, 193 When, however, the gap between what is 'joint' and what is 'common' is thus closed, the conception of a real Group-personality is lost, 193. The dropping of the idea of a Group-person which is distinct

from all individual persons, 194. The attenuation of corporate unity, 194. The introduction of a *persona repraesentativa* in order to produce an independent group-unity, 194.

The dissolution of all group-existence is the ultimate result of these theories, 194. The conception of the moral person reduced to a technical figure of speech, 194 The extremest formulation of the final results of this tendency is that of W. von Humboldt, 194–195.

II. GROUPS ABOVE THE STATE

International society and federations

Conflicting views in the natural-law theory of corporations reflected in the treatment of super-State groups, 195.

International Society, 195. The absolute rejection of the idea of such a society, on the assumption that a non-social state of nature still continues to exist in the relation of States, 195. Pufendorf, 195. Justi [note 172]. In opposition to this view, there is the assumption of a natural society of States, 196. The recognition of positive international law, 196. Mevius, 196. Leibniz, 196 Thomasius, 196. Wolff and his successors, 196. The nature of the society of States, as a *societas aequalis*, 196. Side by side with this view, we also find the idea of a *civitas maxima*, 196. Kant's world-State [note 177]. Fichte [note 177].

Recognition of particular societies of States [i.e. federations], 196. Rejection of the idea of the 'composite' State, under the influence of Pufendorf, 196. Federal relations, 196 The peculiar theory of Thomasius [note 179] *Foedera simplicia* and *systemata civitatum*, 196. The classification of 'Systems of States', 197. Real Unions, 197. *Corpora confoederatorum* not real States, 197. In contradistinction to Pufendorf, we find some writers making an approach to the idea of a truly federal form of State, by assuming the possibility of a federal authority, 197. Recognition of intervening forms, with reference to the German constitution, 197. The re-introduction of the conception of the federal State into Natural Law, 197 Leibniz, 197. Montesquieu, 197 Nettelbladt, 197 His *respublica composita*, 198. Its harmony with the positive law of the German constitution, 198.

III. GROUPS WITHIN THE STATE THE CHURCH

The Church and its relation to the State, as interpreted under the influence of the natural-law theory of society, 198.

CHAPTER I

THE PERIOD DOWN TO THE MIDDLE OF THE SEVENTEENTH CENTURY

SECTION V

The Influence of the Natural-law Theory of Society

§§ 14 and 15

CHAPTER I: SECTION V, §14

THE NATURAL-LAW CONCEPTION OF THE STATE

I. *General view of Natural Law*

1. The intellectual force which finally dissolved the medieval view of the nature of human Groups was the Law of Nature. Quickening, during this epoch,* the germs of thought which had already developed in the course of the Middle Ages, and combining them, in a growing independence of their own, into an organic unity, the theory of Natural Law now confronted the doctrinal edifice of the civilists and the canonists as a definite system, which not only claimed universal theoretical validity, but also demanded practical application.

The Law of Nature issued in a natural-law theory of the State; and it was by developing such a theory that it affected the movement of history most powerfully(1). The natural-law theory of the State was a guide to all the political efforts and struggles from which the modern State proceeds. It is true that speculation was also affected by action, and that every development of the world of thought in this period was an echo and reverberation of historical events. But the relation of the natural-law theory of the State to the actual process of history was never purely passive. On the contrary, it served as a pioneer in preparing the transformation of human life; it forged the intellectual arms for the struggle of new social forces; it disseminated ideas which, long before they even approached realisation, found admittance into the thought of influential circles, and became, in that way, the objects of practical effort. In opposition to positive jurisprudence, which still continued to show a Conservative trend, the natural-law theory of the State was Radical to the very core of its being. Unhistorical in the foundations on which it was built, it was also directed, in its efforts and its results, not to the purpose of scientific explanation of the

* The theories discussed, and the works cited, in this and the following subsection (§15) belong to the period 1500–1650.

(All notes marked thus * † ‡ are by the translator. Notes marked by a number are by Gierke himself, and are printed separately in the latter part of the volume.)

past, but to that of the exposition and justification of a new future which was to be called into existence.

2. The form of expression which the natural-law theory of the State assumed, and which was destined to control the course of future thought, was due to the intimate connection established, from 1570 onwards, between legal philosophy and political theory. It is true that, at first, the State was only incidentally mentioned in the works which dealt with the Law of Nature(2). But the ecclesiastical writers on Natural Law, who generally belong to the Jesuit or the Dominican Order, are already [in the sixteenth century] constructing a system of political theory which is based entirely on the law of Reason(3). Such a system may be found, in its most developed form, in the writings of Suarez(4). It was a definite epoch in the history of thought when Grotius proceeded to elaborate a purely secular philosophy of law which embraced the whole of the life of the State, external as well as internal(5). Long before his time, however, the theory of the State had been placed upon a basis of Natural Law by the writers who dealt with politics proper. It is true that there always continued to exist a political literature which sought exclusively, or at any rate mainly, to handle practical questions of pure utility, and only referred incidentally, at the most, to the legal bases of public life(6) We may even say that the treatises which dealt with *raison d'état* were expressly directed against any exaggeration of the value of juristic interpretation(7). But it was generally regarded as the duty of political theory to include the legal nature of the State in the sphere of its investigations, and to propound accordingly a theory of 'general public law' (*allgemeines Staatsrecht*);* and this method of procedure increasingly strengthened the tendency to think in terms of Natural Law. We must admit, indeed, that the thinkers who still persisted in making the *Politics* of Aristotle their basis, or followed other classical models, were far from adopting all the elements of the new mode of speculation. The *De Republica* of Gregorius Tholosanus, for example(8), the writings of Arnisaeus(9), the numerous political disquisitions of Conring(10), and many other works on political theory, both of an earlier and a later date(11), can none of them be ascribed to the authentic current of natural-law speculation. But, on the whole, the natural-law theory

* Public Law (*Staatsrecht* or *öffentliches Recht*) is what we should call Constitutional Law—the law concerned with the rights and duties of the State. It is contrasted with private law, which deals with the rights and duties of subjects

of the State finally won the day when Bodin, in his *De Republica*, emancipated the theory of public law from the classical tradition, and made the modern conception of sovereignty the pivot of his argument(12).

In particular, the literary controversies on the political and religious issues of the day increasingly tended, after his time, to broaden out into fundamental differences about the nature of sovereignty; and throughout the course of these controversies the champions of popular sovereignty(13), like the defenders of the sovereignty of the Ruler(14), availed themselves of the weapons of Natural Law. Espousing the cause of popular sovereignty, Althusius then proceeded, early in the seventeenth century, to erect the first complete system of political theory which was wholly based on Natural Law(15). After his time we find numerous textbooks of political theory which, however widely they may diverge in their fundamental tendencies, are nearly always agreed in attempting to find the justification of their contentions in a natural-law theory of the State(16). Besold stood alone in combining an interpretation of the State in terms of Natural Law (an interpretation which, as we have already had reason to notice,* now begins to pervade the scientific treatment even of *positive* public law) with an historico-legal justification of the *status quo*(17). Finally, at the end of this period [i.e about 1650], the political theory based upon Natural Law received from the Radical audacity of Hobbes a form which was at once the culmination of its past and the foundation of its future development(18) Overreaching itself in the very rigour of its logic, his theory threatened the utter extinction of any genuine public law.

3. The natural-law point of view affected public law at an earlier date, and with greater force, than it affected private law; and this in spite of the fact (or perhaps because of the fact) that opinions about the relation between natural and positive law continued to be more fluid, and more uncertain, in the sphere of public than they were in that of private law. The reason was that public law lacked the solid basis which the jurisprudence of the civilians,†

* The reference is to an earlier subsection (§ 2) which is not here translated.

† The civilians are the lawyers of Roman law, which had been studied and developed during the whole of the Middle Ages, in western Europe at large, and continued to be studied and developed in Germany, as a *usus modernus*, during the period from 1500 to 1800, of which Gierke treats. On the whole, as Gierke implies, the civilians were mainly concerned with questions of private law

interminably though it was occupied in spinning a web of controversies about the nature and the extent of Natural Law, was always able to find in its reliance upon texts of Roman law. The jurists generally started from a division (at bottom only appropriate to the sphere of private law), according to which law fell into the three branches of *jus naturale*, *jus gentium*, and *jus civile*. They often proceeded, following the lines of the theories of the Middle Ages, to distinguish between the 'primary' and the 'secondary' rules of *jus naturale* and *jus gentium*(19), or, confining themselves to the latter, they sought to draw a contrast between *jus gentium primaevum* and *jus gentium secundarium*(20); but the tendency grew in favour of a doctrine of simplification, which ignored such subdivisions as foreign to the original texts(21). As this tendency spread, the common foundation of both *jus naturale* and *jus gentium* in the dictates of the natural reason of man also came to be emphasised more strongly(22). But what was primarily intended to be conveyed by such emphasis was only the simple fact of a line of division between those parts of the system of *private law* which were uniform and immutable, and those which were subject to change.

We accordingly find a number of jurists going to the length of maintaining that the whole distinction [between uniform or natural and variable or positive elements] had no application to *public law*, and that public law, on the contrary, was entirely and totally positive(23). The majority, however, took a different line. They ascribed to *jus publicum* [equally with private law] a mixed content drawn from all the three sources of *jus naturale*, *jus gentium*, and *jus positivum*(24). But as soon as a separation of these various elements was attempted, the category of *jus gentium* inevitably proved itself to be inapplicable to public law(25). The result was —in the sphere of the philosophy of law and of political theory as well as in the legal treatises of jurists who included public law in their scope—that the tripartite division of law yielded more and more to a simple division between the categories of natural and positive law(26). Even when the Roman conception of *jus gentium* was actually retained, it usually lost any separate and independent significance; and it receded altogether into the background as an effective element in the constitution of the State(27). Thus there was gradually developed a theory of pure Natural Law,* in which

* I e in the sphere of public law, the element of *jus naturale* was left alone, or 'pure' (the element of *jus gentium* having almost entirely disappeared), to confront the element of *jus positivum*.

the conception of *jus gentium* only appeared, in the entirely changed sense of international law, as the particular form of Natural Law which was valid among sovereign States(28).

It is astonishing to find this theory of pure Natural Law made to cover all the fundamental relations involved, and to decide all the fundamental questions raised, in the whole of the life of the State. Yet its adherents were unanimous that the transition from a state of nature, exclusively controlled by Natural Law, to the conditions of political life, had always been made in obedience to immutable natural rules, and that the union of men in a political society, and the erection of a political authority, had always taken place in virtue of the same eternal principles. The first product of positive law, and the first occasion for the play of human will, which they consented to admit, was merely the choice of a particular form of State(29). Positive law being denied any capacity to affect or disturb the foundations of Natural Law, the solution of every fundamental problem in regard to the relation of the community to the individual, or that of the Ruler to the People, was accordingly left to the scope of a Law of Nature which sat high enthroned above the whole of historically established law. Now the primary practical object pursued by the theorists of Natural Law was the delimitation of an area within which objective Right* should be withdrawn from the caprice of the legislator, and subjective Right should escape the attacks of the State's authority(30); and the investigation of the limits of this area immediately entailed a far greater latitude of discussion on questions of public law than had ever previously been possible in the sphere of civilian theory(31). It was thus with a new and unprecedented force that the theory of Natural Law was able to enter the domain of public law, and to impose its claim to measure existing institutions by the irrefragable rule of Reason(32). And it was preeminently in *that* domain that the exponents of this theory came more and more to regard their ultimate task as consisting in the discovery of a rational ideal, which, if it could never be fully

* The same word *Recht* means (*a*) a system of law existing objectively as an external norm for persons, and (*b*) a system of rights enjoyed by those persons, as 'Subjects' or owners of rights, under and by virtue of that norm. The same thing is both a system of law outside me, when I look at it objectively, as obligatory upon me, and a system of rights inside me, when I look at it subjectively, as belonging to me and as giving me a legal position. Objective Right is what we call Law; subjective Right is what we call rights. But the two are different sides of the same thing, like the obverse and the reverse of a coin.

realised in actual life, was none the less to be made the object of a constant effort at approximation(33).*

4. In the theories about the nature of the State, which developed under the influence of this intellectual movement, there were contradictory elements, which conflicted seriously with one another; but the natural-law theorists were all agreed in making a definite break with the political ideas which had originated in the Middle Ages. The theocratic idea waned(34). The State was no longer derived from the divinely ordained harmony of the universal whole; it was no longer explained as a partial whole which was derived from, and preserved by, the existence of the greater: it was simply explained by itself. The starting-point of speculation ceased to be general humanity: it became the individual and self-sufficing sovereign State; and this individual State was regarded as based on a union of individuals, in obedience to the dictates of Natural Law, to form a society armed with supreme power

II. *General view of Sovereignty in natural-law theory*

1. Two necessary attributes are thus presented [in this natural-law system of political theory] as determining the conception of the State. One is the existence of a society (*societas civilis*), directed to the objects which compel men to live together: the other is the existence of a sovereign power (*majestas, summa potestas, summum imperium, supremitas*, etc.), which secures the attainment of the common end. Both of these attributes recur in every definition of the State(35). But it was the second which, as soon as Bodin had taken his decisive step, came into prominence; for while the State shares the character of a purposive society with other forms of association, the attribute of sovereignty is its peculiar and specific criterion. The philosophical theory of the State thus becomes increasingly, and essentially, a theory of sovereignty(36).

Sovereignty ('majesty', 'supremacy', etc.),† in the theory of Natural Law, not only means a particular form or quality of political authority; it also means political authority itself, in its

* I.e. the theorists of Natural Law concentrated on the constitutional side of law (= public law), and attempted to lay down the 'natural' or proper form of constitutional law for all States, or rather to enunciate an ideal form which all States should seek to attain We may say that this tendency is particularly illustrated in Vattel's *Droit des Gens, ou principes de la loi naturelle*, especially in Book I.

† *Majestas* is the usual Latin word for sovereignty, and 'majesty' is often used by Gierke as synonymous with sovereignty.

own essential substance (37). The word 'sovereignty' becomes something in the nature of a magic wand, which can conjure up the whole sense and content of the State's general power. The original negative conception—the conception of a power which is not externally subject to any *Superior*—is made to assume a positive form by being as it were turned 'outside in', and used to denote the relation of the State to everything which is within itself. From the quality of being the 'supreme' earthly authority [i.e. the quality of being simply the *highest* authority], there is deduced the whole of that absolute omnipotence [i.e. the quality of being the *only* authority, and therefore unlimited and all-powerful] which the modern State demands for itself. [Nor is this creed the monopoly of one side.] The champions of popular sovereignty vie with the defenders of monarchism in exalting its claims.*

It is true that all sorts of differences arose about the extent and content of this exclusive power. Different conceptions of the end of the State necessarily entailed different conclusions about the extent of the rights of 'majesty' which served as the means of its realisation; more especially, the ecclesiastical limitation of the end of the State to the secular sphere involved a large reservation in favour of ecclesiastical authority. Different views about the efficacy, and the extent, of the legal limits which were regarded as binding even on the supreme power also produced a variety of different interpretations of the maxim that sovereignty was a *potestas legibus soluta*, an 'absolute' plenitude of power. With these, in turn, were connected the controversies which turned on the possibility of a division, or multiplication, or limitation of 'majesty'—controversies which raised the question whether the legal ideas which any such possibility involved were really consistent with the logical presupposition of the unity, indivisibility, and inalienability of the supreme power.

On one point, however, there was general agreement. Whatever the form it took, this right of sovereignty was a right which was given and inherent in the very conception of the State. On this it followed that the origin of 'majesty' (though there might be a number of explanations of its precise mode) was always ascribed to one single general cause—the original act of State-creation, in obedience to Natural Law, which was anterior and superior to the process of historical legal development. When sovereignty was

* E g. Rousseau may be said to vie with Hobbes in exalting sovereignty, though his sovereign is the General Will, and not a single Leviathan.

regarded as an *inherent and original right* of the State, there could be no need to explain it by any particular title of acquisition. When it was regarded as an *indestructible right*, it was secure against the assault of any legal title of more recent origin by which it might be confronted. And it was the *whole* of the substance of sovereignty which was thus secured and protected. Being a right which was both all-inclusive and *sui generis*, sovereignty must necessarily embrace each and every particular right of control which belonged to the nature of the State. In terms of adulation, it was compared to the inexhaustible ocean, which receives again into itself all its own effluences it was celebrated as a sun, the source of universal light and heat, whose radiation never diminishes the eternal central fires (38).

2. But the more sovereignty was exalted, the hotter raged the dispute about its 'Subject' or owner (39).* Here again the ultimate decision was sought on the basis of Natural Law. Though there was a general agreement that a variety of constitutional forms had been produced by positive law, the fundamental issue of the ownership of sovereignty was none the less regarded as prior to the historical differentiation of constitutions. In all forms of State indifferently, a distinction was drawn between the Ruler and the body of the Ruled: the legal basis of the Ruler's authority was regularly ascribed to a previous devolution of its own authority by the body of the Ruled; and in this way it was easy to produce a single formula, equally applicable to monarchies and to aristocratic or democratic republics, which expressed, in terms universally valid, the relations always existing between Ruler and People under the system of Natural Law. From this point of view it was regarded as a secondary question—a question of mere historical title, irrelevant to the deeper question of principle—whether it was a single person, or a privileged assembly, or an assembly of all deciding by majority-vote, that held the position of Ruler in any actual State (40). Even the controversy about the possibility of a mixed constitution (though falling within the scope of Natural Law, in

* As we saw above, *Recht* in general is both 'Object' and 'Subject'. Something similar is true of my own particular element of *Recht*. My right of property in land has an 'Object'—the piece of land I own, which is the objective expression of that particular right It has also a 'Subject'—myself as owner, which is the subjective expression Wherever 'Subject' is used in the following pages (generally, for the sake of clarity, with the addition of the words 'or owner'), this is its sense From this point of view 'subject' in our English sense ('the King's subject') is the 'Object' of sovereignty. When the word 'subject' is used with a small 's', the reader is asked to take it in this latter sense.

virtue of its bearing on the nature of the State's authority) was treated as posterior and secondary to the settlement of the fundamental issue of the 'Subject' of sovereignty—on the ground that it only related, after all, to the internal structure and composition of the Ruling authority(41). The primary question on which debate always turned was purely that of the positions to be accorded to People and Ruler on the basis of Natural Law.

On this question, as we can readily understand, it was the figure of the Monarch which presented itself first to the minds of most thinkers. But we have to remember that, just as the champions of monarchical claims expressly allowed that the 'collective' Ruler in a Republic possessed the same plenitude of power which they ascribed to the Monarch(42), so the opponents of princely absolutism equally attempted to limit both monarchy and democracy. Having ascribed certain overriding powers to the body of the People under a monarchical system, they proceeded, logically enough, to argue that even in a purely democratic State such overriding powers, belonging as they did to the whole body of the People, were distinct from the ordinary rights belonging to the majority of the assembly which was vested with Ruling authority(43). We can thus understand how the natural-law theory of the State came to be radically divided into the two sharply contrasted schools of 'Popular Sovereignty' and 'the Sovereignty of the Ruler'—with the middle view of a 'double majesty'* intercalated (in a variety of forms) between the two(44). But there is also a further cleavage to be noted in the natural-law theory of the State. Among the adherents of simple sovereignty [whether of Ruler or People—as distinct from the advocates of 'double majesty'], a number of different shades of opinion may be distinguished, determined by the extent to which thinkers assumed the existence of some fundamental limitation—either of Popular Sovereignty, by an independent right belonging to the Ruler; or, conversely, of the Sovereignty of the Ruler, by some independent right belonging to the body of the people(45). Over and above this, we have still to note a third and final cleavage. The question arose of the extent to which the 'Subject' of Ruling authority (whether such authority was conceived as sovereignty pure and simple, or as 'secondary' sovereignty, or even as not being sovereignty at all)† could be

* The theory of *duplex majestas*, as we shall see later, means the theory of the conjoint sovereignty of both Ruler and People.

† Ruling authority may be sovereignty pure and simple, as in a pure monarchy or republic: it may only be secondary sovereignty, e.g. when a monarch

qualified and controlled by positive law(46); and, more particularly, how far, in such a case, a division of this authority among several 'Subjects', or a participation of several 'Subjects' in its exercise, could be regarded as possible(47).

III. *People and Ruler as separate personalities*

1. In the conflict of political theories People and Ruler thus came to be opposed as rival powers; and each of these powers, when once it had vindicated for itself any political right whatever, was bound to be regarded as a separate *personality.** We have now to enquire what conceptions were held of the personality of the People on the one side, and of that of the Ruler on the other; and then we shall have to consider whether, and if so how, it was found possible to transcend the dualism of the two by a conception of the one personality of the State.

It was universally held, until Hobbes dealt a death-blow to the idea, that the People possessed a separate personality. Thinkers were agreed that the People had originally owned political power, whole and undivided, and had subsequently, by a contract, subjected itself to a Ruler(48) But to possess the capacity for such an act, the People must already have been—before the erection of such an authority, and independently of its existence—a definite 'Subject' or owner of rights(49). In the view of all the upholders of the theory of contract in this period [i e. before Hobbes], the institution of a government did not imply that the People thereby surrendered every political right, but only that it renounced its sole possession of rights To the believers in Popular Sovereignty, the People still remained, as much as before, the 'Subject' or owner of 'majesty', to the exponents of the theory of 'double sovereignty', it was still the 'Subject' of the greater of the two 'majesties'; to the advocates of the theory of a limited sovereignty of the Ruler, it continued to be the 'Subject' of the rights which limited 'majesty'; and even the champions of the absolute power of the Ruler reserved for the People at any rate two things—a claim to the due fulfilment of the contract of government, and the

owes his ruling authority to the primary sovereignty of the people, or exercises it subject thereto: it may not be sovereignty at all, if the Ruler is a mere delegate or commissary.

* A right involves a 'Subject', a 'Subject' of a right is a person; and a person has personality If there are State-rights, there must be some person, with a personality, as their 'Subject'. Is that person the People, or the Ruler, or can it be something above both?

right of resuming possession of 'majesty' in the event of its alienation(50). It followed, that, even after the State had already been formed, the People still preserved, to some degree or other, a personality of its own, which must of course be the same as its original personality(51).

But if it thus existed before any political authority, and independently of such authority, the personality of the People was inevitably bound to be conceived as being of the nature of a purely *collective personality*. It is true that it was the universal habit of thinkers—using terms such as *universitas*, *communitas*, or *corpus*, and calling in aid the [Roman-law] theory of the Corporation—to explain the personality of the People as a corporate [and not a collective] unity. This was the case with the Monarchomachi, among whom we find Junius Brutus [the author of the *Vindiciae contra Tyrannos**], like Althusius afterwards, making an extensive use of the theory of the Corporation(52). The idea of the People as a corporate unity also appears in the theories of double sovereignty(53), and in the cognate theory of Grotius(54); it is used in the works which advocate the doctrine of the limited sovereignty of the Ruler, and especially in the ecclesiastical theory of politics developed by Soto, Molina and Suarez(55), and it may even be traced in the writings of the absolutists, so far as they deal with the rights of the People(56). But though the writers of our period [1500–1650] thus brought the popular community under the head of the conception of Corporation, they steadily followed a line of thought which tended to the dissolution of corporate existence, in all its forms, into partnership connections with a merely collective unity; and while they borrowed from the theory of the Corporation, they borrowed only those principles which fitted into this tendency This explains why they had no objection to describing the popular community as a *societas*, and believing that it actually was a *societas*, at the same time that they also applied the theory of the Corporation(57).† If, on the other hand, the conception of 'partnership' was taken seriously, and if it was genuinely applied to the community of the People, the internal substance of this community was bound to dissolve itself into a mere system of reciprocal rights and duties of individuals. Even the thinkers who

* On the authorship of this work see E Barker (essay in *Church, State and Study* on the 'Huguenot theory of politics', and *Cambridge Historical Journal*, 1930).

† We have here to distinguish the *universitas*, or corporate unity, from the *societas*, or partnership, in which the members remain distinct, in spite of their connection, and the unity is thus 'collective' rather than corporate.

clung to the doctrine of Aristotle, and sought to lay particular emphasis on the natural growth of civil society, could oppose no permanent barrier to this process of dissolution (58). When the theory of the social contract triumphed, and the unity of the People was referred to a contractual act, it became entirely impossible to escape from the circle of individualistic ideas (59).

There were, indeed, some of the natural-law theorists who attempted, in spite of their individualistic premises, to attain the idea of a Universal which existed in its own right, and to believe in a Whole which depended only upon itself. The ecclesiastical writers on the philosophy of law, in particular, sought to prove that the community of the People, though it was freely created by individuals, did not derive its rights from them (60); but in defending such a paradox even the ability of a Suarez could only produce an ingenious *jeu d'esprit* (61).* In the philosophy of these writers, equally with the rest, a sovereign Universal which proceeded from the contractual act of autonomous individuals was bound to remain at the level of an aggregate of individuals (62). If the conception of a social contract was pushed to its logical conclusion, any right belonging to a community was necessarily reduced to the collective rights of a number of individuals (63); and the internal nexus of the popular community became nothing more than a network of contractual relationships between its various members (64). In the writings of Althusius we already find the idea of mere 'social' connection [or, in other words, the idea of simple 'partnership'] extended to the whole of the State, and this in spite of the fact that he lays more emphasis than any other writer upon its corporate character (65). Grotius, too, may be said to fill the formal mould of Corporation with the actual ore of *societas* (66). Yet it is obvious that, if you limit the internal nexus of a community to a mere matter of reciprocal rights and duties among all its individual units, you can only give the People the unity which it needs, in order to be a 'Subject' of rights, by assuming a merely external form of association between its members.†

It is thus a purely 'collective' interpretation of the personality of the People which really predominates in the natural-law theory of the State. The People is made co-extensive with the sum of its constituent units; and yet simultaneously, when the need is felt

* Gierke seems unjust to Suarez in this remark. See the translator's notes appended to notes 60 and 62.

† And therefore you cannot really speak at all of a Corporation, which is something transcending any mere external form of association.

for a single bearer (*Trager*) of the rights of the People, it is treated as essentially a unit in itself(67). The whole distinction between the unity and the multiplicity of the community is reduced to a mere difference of point of view, according as *omnes* is interpreted as *omnes ut universi* or as *omnes ut singuli*(68). The eye resolved upon 'reality' refuses to recognise, in the living and permanent unity of the existence of a People, anything more than an unsubstantial shadow; and it dismisses as a 'juristic fiction' the elevation of this living unity to the rank of a Person(69).* On the basis of this logic the common will was dissolved into a mere agreement of individual wills(70); and thus the co-operation of every individual came to be regarded as inherently necessary, if the popular community was to act directly and immediately as such(71).† Somewhat inconsequentially, this demand for unanimity was only sustained in regard to two points—the original constitution of civil society, and the subsequent alteration of certain of the original articles on which its existence depended(72); and on other points majority-decision was regarded as adequate(73). But this required a further fiction [in addition to the original 'fiction' that the People was a Person], in order to justify the identification of majority-will with the common will of all(74).

A similar difficulty arose in regard to the representation of the People. Any capacity for acting in lieu of the People could only be ascribed, from the general point of view with which we are dealing, to a procuratorial power conferred collectively by all individuals. Once more, therefore, recourse was had to a fiction—the fiction of the bestowal of such procuratorial powers in and by the act of election‡—in order to justify the assumption (which actual facts made inevitable) that it was possible for the popular

* The reader may possibly sympathise with 'the eye resolved upon reality', and he may thus be led to doubt whether what Gierke calls the *Daseinseinheit des Volkes* is really a substance, in the sense of a being or person The unity of existence present in a People may be argued to be the unity of a common content of many minds, or in other words of a common purpose, but not the unity of a Group-Being or a Group-Person.

† In other words all the members must pass a unanimous decision, if the community was to act otherwise than through some 'organ' or agency.

‡ It may be doubted whether the bestowal of procuratorial powers in and by the act of election should be regarded as a fiction. In England, Edward I actually and expressly required that representatives should be given *plena et sufficiens potestas pro se et communitate ita quod pro defectu hujusmodi potestatis negotium praedictum infectum non remaneat* (Stubbs, *Select Charters*, 9th ed., pp 481–2). The English clergy were using *literae procuratoriae* early in the thirteenth century, cf E. Barker, *The Dominican Order and Convocation*, pp. 48–50.

community to be 'represented' in the exercise of its political rights by an assembly of Estates (75). The thinkers who strictly adhered to the logic of their premises proceeded to contend that the People itself still enjoyed, as against its own representatives, the position of the head of a business (*Geschaftsherr*) (76). Althusius in particular, although he applied the idea of the representative constitution at every point,* attempted none the less to protect the sovereignty of the community from the danger of being absorbed by its own representatives (77). But even when, in actual fact, nothing at all survived in the way of direct and immediate rights of the People, the view continued to be maintained, as a matter of theory, that the collective unity of the whole People still continued to be the true 'Subject' or owner of popular rights, over and above any assembly of Estates which was actually entitled to exercise such rights (78).

2. A separate personality of the Ruler, distinct from that of the People, was generally recognised as the 'Subject' of the rights of government. Such a view was obviously entailed both by the theory of the Sovereignty of the Ruler and by that of a double sovereignty; but even the pure theory of Popular Sovereignty, as long as it continued to include the idea of a contract of government,† which was first overthrown by Rousseau, was necessarily committed to the admission of an independent personality belonging to the Ruler (79). Without such a personality, it is obvious, a permanent relation of contract between Ruler and People was inconceivable But this personality of the Ruler necessarily varied in character, according as the right to rule was assigned to a single person, or vested in a body of persons (80). Moreover, if the possibility of a mixed constitution were admitted, the personality of the Ruler might be divided into a number of personalities; or short of this, if a single constitutionally limited Ruling authority were allowed to be possible, that Ruling authority might find at its side another 'Subject' [in the shape of the authority enforcing the constitutional limits] which had a conjoint right to the exercise of

* I.e. holding a federal idea of the State, Althusius applied the idea of representation both to the federal State as a whole and to the units of which it was composed

† Gierke distinguishes between *Gesellschaftsvertrag* (*pacte d'association*), or the contract of each with all, which creates a State in the sense of a political society, and *Herrschaftsvertrag* (*pacte de gouvernement*), or the contract of such a society with a person or body of persons, which creates a State in the sense of a government.

Ruling power(81). If, in any of these ways, a body of men were vested with the right, or with a conjoint right, to the exercise of Ruling authority, the conception of a collective personality [already applied to the People as distinct from the Ruler] was applied once more to meet the case of such a body. Thinkers accordingly spoke of the right of government as belonging to 'several' or 'many'; and they described a republic, for example, as 'the government of many'(82). But they insisted at the same time that the right of government belonged to these 'several' or 'many' only when acting in conjunction(83); and they argued accordingly that although an artificial unity here took the place of the natural unity inherent in the nature of monarchy, it was still a case of a *single* Ruling personality(84). The distinction between *omnes ut universi* and *omnes ut singuli*, which had been applied to the People, was also generally applied to this case of a body of Rulers; and the individual Optimates of an aristocracy, or the individual citizens who possessed the suffrage in a democracy, were declared to be subject to the community which they collectively constituted(85). This community, we may note in passing, was always identified with the majority of its members; in a word, the majority *was* the community(86).

When thinkers thus insisted on connecting the 'Subject' or owner of the legal exercise of Ruling power with the visible fact of an assembly of individuals, they could not escape a merely collective conception of such a 'Subject' of power(87). When, on the other hand, a *single* person was vested with Ruling power, the conception of his natural personality was accepted as adequate(88). The monarch for the time being was thus regarded as owning, by way of private proprietary right,* the whole of the powers which constituted the right of the Ruler, as distinct from the right of the People. It is true that a distinction was drawn, in regard to the 'Objects' covered by the Ruler's rights, between (1) the area of such rights and duties as were derived from the title of being the Ruling authority and (2) the sphere of the private rights of the Monarch [as a natural person], but, in dealing with the problem of the 'Subject' or owner of rights, theorists stopped at the simple fact of the physical unity of the one individual. The natural-law theory of the State made very little use of the idea that the Monarch

* The authority of Loyseau, *Traité des Offices*, may be claimed for this view. Monarchs, he writes, *ont prescrit la propriété de la puissance souveraine, et l'ont jointe à l'exercice d'icelle* (II, ch. II, §§25–6).

played the part of two persons; and even the question of the continuity of the Ruler's personality in the event of a change of the occupant of the throne (a question which might seem to involve the use of that idea) was constantly befogged by the introduction of the notion of simple hereditary succession to the whole aggregate of rights(89).* Grotius, indeed, made an effort to draw a distinction in principle between the acts of a king as king and his acts as a private individual(90); but on the whole we may say that it was only found possible to distinguish the public sphere of the Monarch from his private sphere when they were both made to take their place by the side of a concurrent right of the general community of the People(91).†

IV. *Attempts to eliminate the dualism of People and Ruler The idea of a single State-personality*

1. The dualism of the two personalities—that of the Ruler and that of the People—was an obvious survival from the medieval State, with its system of Estates confronting the King; but it was in marked contradiction to the unitary tendency of the modern State. A movement was thus bound to make itself felt among the theorists of Natural Law in favour of obliterating the old antithesis by the development of a conception of the single *personality of the State*. In a variety of ways some approach was actually made to such a conception. Unable, however, to transcend the limits of an individualistic system of thought, the thinkers of the school of Natural Law never really succeeded in attaining a true idea of the personality of the State. They could only achieve, at the most, a one-sided exaggeration, either of the personality of the People, or of that of the Ruler.

The idea of the State as an *organic whole*, which had been bequeathed by classical and medieval thought, was never entirely extinguished. But the natural-law tendency of thought was hardly qualified to achieve the construction of an organic theory, or to crown it by the discovery of an immanent group-personality. The comparison of the State to an animate body regularly continued

* The allusion is to the regular succession of a private heir, under Roman private law, to the *whole* estate—*per universitatem successio*.

† If you banish the community, and leave the king isolated, you then confuse the two 'personalities' of the king—the public and the private—in the blaze of his solitary glory. If you admit the community by the side of the king, you can say that he stands in two relations to it—the public and the private.

to be drawn; and in this period too* [as had been done before in the Middle Ages] it was drawn out in detail, with a greater or less degree of good taste, by a number of writers. A distinction was made between the head and the members of the 'body politic': descriptions were given of the structure and functions of its internal organs: the differentiation and the harmonious connection of the several parts were shown to issue in a living unity of the Whole (92). The rule of the soul over the body was also adduced to illustrate the living unity of society; and the idea of a spiritual force thus informing the social body was then brought into connection with the notion of a single and indivisible sovereignty (93).

Various and contradictory as such pictures were, there could yet be extracted from them an idea which was capable of juristic formulation—the idea of a group-being, distinct from the sum of its members, which was vested as a whole with legal authority over its parts So interpreted, the conception of the social organism was not only used by writers, such as Gregorius Tholosanus (94), who continued to maintain the natural origin of the political community. it was also dovetailed into the theory of a social contract, as an element which served to counteract, in some degree, the individualistic premises of that theory. It is in the ecclesiastical systems of Natural Law, which culminated in the theories of Molina and Suarez, that we find the most vigorous attempts to use the idea of the organic nature of the State in order to vindicate for the social Whole, when once it has been called into existence, a power of control over its parts which, notwithstanding its contractual origin, is none the less independent of the wills of individuals (95). [Such ideas were not confined to these Catholic writers] We also find Althusius turning his original *consociatio*, which he has constructed purely on the basis of partnership, into a *corpus symbioticum*, and holding that the organic unity of this body explains the authority of the community over its members (96). Grotius, too, emphasises strongly the character of the State as a composite body, with its own independent system of life (97), in particular, he gives an admirably exact expression to the idea of the corporate 'organ', in the action of which the whole body itself is simultaneously active (98). † In fact, there was hardly a single

* The period from 1500 to 1650. For the use of this analogy in mediæval thought, see *Political Theories of the Middle Age*, pp 24 *seq.*

† Grotius argues that just as the body is the general and the eye the specific 'Subject' of vision, at one and the same time, so, at one and the same time, the

system of political theory which entirely escaped this 'organic' tendency of thought; and even the cause of monarchical absolutism was made to profit from the arguments which it supplied.

But the thinkers of our period, like those of the Middle Ages, never took the really decisive step. While they recognised an invisible unity as the internal principle of life in the body politic, they never conceived it as being the true Ruling personality. The organic theory was never applied to the problem of the 'Subject' of sovereign power. The organic being of the State stopped short, as it were, at the neuter gender; and an organic interpretation was only used to explain the objective connection of the parts of a Whole and the system of control involved in that connection * As soon as the issue became that of finding personal 'Subjects' for this system of control [there was never any admission that an organic Group-person was such a 'Subject', but] the stage was at once again occupied merely by individuals, or by assemblies of individuals. An organism of this nature, destitute of any Ego, was after all only a simulacrum of a living being. In spite of all assertions to the contrary, it was no more than a work of art, counterfeited to look like a natural body; a machine, invented and controlled by individuals. Here again Hobbes—anticipated, it is true, by similar suggestions in previous writers(99)—only pushed the premises of the natural-law school to their ultimate logical conclusions. He began by comparing the State, that great Leviathan, to a giant's body; he proceeded to expound, in the minutest of detail, its analogies with a living being(100); but he ended by transforming his supposed organism into a mechanism, moved by a number of wheels and springs, and his man-devouring monster turned into an artfully devised and cunningly constructed automaton(101).

In this position of affairs, it became impossible to vindicate unity for the personality of the State except by vesting it exclusively in *one or other of the constituent parts* of the body politic [the People, or the Ruler].

2. The advocates of popular sovereignty attempted to represent

body politic is the general and the Ruler the specific 'Subject' of political authority.

* I e the organic analogy was applied (1) to the impersonal fact of the connection of parts (as in an organism), and (2) to the equally impersonal fact of a system of common control for maintaining that connection (again as in an organism), but it was not applied (3) to the personal factor of a controlling group-personality (such as also appears, on Gierke's view, in an organism).

the personality of the People as the one and only bearer (*Träger*) of all political rights. Among the Monarchomachi the express identification of 'People' and 'State' is frequent. They ascribe supreme authority to the *respublica*, or the *regnum*, in just the same sense in which they speak of the 'majesty' of the *populus*, or of the *universitas populi*, or of the *universitas civium et subditorum* (102). In the same way, and without any idea of suggesting a difference between the two terms, they sometimes describe particular rights of government as rights of the People, and sometimes as rights of the State (103); they speak of public property as the property of the People, *or* the State (104); they treat decisions of the sovereign community as expressions of the will of the People, *or* the State (105). In Althusius, the *respublica* is consistently identified with the *universitas populi* (106). Salamonius, if he actually speaks of a *persona civitatis* as superior to the *persona principis*, ascribes this *persona* to the sovereign People (107) Such interchange of terms was not, however, enough to make a personified popular community into a real State-personality which served, by its own inherent nature, as the active and effective 'bearer' of the will of the commonwealth. The community of the People, as it was understood in natural-law theory, was never anything more than the sum of its individual members regarded as a single unit; and on this it followed that a Ruler vested with the exercise of State-authority was related to that community, not as a constituent element included in it, but as the bearer of a power confronting it from without (108).

So long as the principle was maintained that the State owed its origin, not to the original foundation of civil society, but to the conclusion of a subsequent contract between that society and the bearer of Ruling power, the 'Subject' of political rights was necessarily doomed to be a divided and dual 'Subject'. Thinkers might limit the rights of the Ruler ever so rigorously; they might even degrade him to the position of servant of the People, and threaten him with punishment and deposition if he went beyond his appointed sphere, they could not escape the logic of their principles. The contractual relation must always involve a duality of persons; a personality of the Ruler must always emerge by the side of the personality of the People, equally essential to the existence of the State (109). It was only with the elimination of the last traces of a contract of government that it became possible to banish entirely the idea of the personality of the Ruler, and to confine the personality of the State, without qualification or

reserve, to the sovereign community of individuals. But this was a height of radicalism which was never attained before the appearance of Rousseau's *Contrat Social*(110).

3. The many adherents of the theory of a double sovereignty, like the advocates of popular sovereignty, assumed an essential identity of 'State' and 'People'; but they were even less able, on the basis which they had adopted, to attain the idea of a real unity of the personality of the State It is true that they always described the State (*Respublica*, *Imperium*, *Regnum*) as the 'Subject' of *majestas realis*, and that they never ascribed to the Ruler anything but a *majestas personalis*(111). These phrases may lead us to think, at the first glance, that they really proclaimed the idea of the sovereignty of the State; and there was, indeed, some dim inkling of that idea in their philosophy(112). But when they come to expand their doctrines in detail, any vestige of such an idea at once disappears. The terms they use may make it seem possible for them to interpret the two 'majesties' as only two different forms of the exercise of a single right; but they never attempted such an interpretation. They treated the two 'majesties' as separate spheres of authority, and they made them unequal in scope and range. Their origin was assigned to an act by which the People disengaged *majestas personalis* from its own originally complete and exclusive 'majesty', and conferred it upon a Ruler, while reserving *majestas realis* for itself; and the relation between the two was conceived as determined by the contract which was then made between the two separate possessors.

The theory of double 'majesty' thus involved a double 'Subject' of rights; and it was therefore impossible for its advocates to find any way of treating the State as the one and only 'Subject' of State-authority, or of interpreting the Ruler as the constitutionally appointed chief 'organ' of that 'Subject'. They used the word 'State' [just like the advocates of the theory of popular sovereignty] simply to denote the personified People, which confronts the Ruler as a multitude of individuals connected together in a collective unity. To this collective body, which is indifferently described as *respublica* and *populus*, the higher of the two sovereignties is ascribed(113); to it are assigned the various powers comprised in that sovereignty(114); the possessions of the State are treated as its property(115); it is conceived as entitled to exercise, either in a primary or a representative assembly, a supreme authority to which the right of the Ruler is subject(116). At the

same time, however, the Ruler is made to enjoy, in the shape of *majestas personalis*, a State-authority which is independent when acting in its own sphere; and this authority, with all the powers of government and the lucrative rights which it comprises, is treated as his by right—a right derived, it is true, from contractual acquisition, but yet, in virtue of that very title, a personal and private right(117). Different limits were often ascribed to the authority of the Ruler(118); but these differences do not affect the truth of two propositions. In the first place, no limitation of *majestas personalis* could ever deprive its 'Subject' of the position of a separate Ruler-person. In the second place, no extension of his derivative sovereignty could ever elevate the position of the Ruler-person into that of a true State-personality, so long as there still loomed in the background, even in the most shadowy of outlines, the form of a more original and a higher sovereignty belonging to the collective body of the People. This self-contradictory theory accordingly perpetuated the old dualism in regard to the nature of the 'Subject' of public authority; it failed to incorporate the Ruler in the People, and yet it was forced to regard State-personality as resident in the People(119). The opponents of the theory objected to it, with justice, that in spite of its logical *tours de force* it never succeeded in rising above the simple idea of popular sovereignty(120).

4. The theory propounded by Grotius, of a double 'Subject' of sovereignty [as distinct from a double sovereignty], approached much closer to the conception of the sovereignty of the State. Leaving supreme power single and undivided, Grotius assumes two 'bearers' of that power recognising only a single 'majesty', which permeates the whole body politic as the soul permeates the body, he maintains that, just as the whole body and the eye are simultaneously 'Subjects' of the power of vision, so, in the State, there are two simultaneous 'Subjects' of supreme authority. The whole State (*civitas*, i.e. *coetus perfectus*) is itself the *subjectum commune* of authority: the Ruler (*persona una pluresve pro cuiusque gentis legibus et moribus*) is the *subjectum proprium* (I, c. 3, § 7). But even Grotius, though he formulates the sovereignty of the State in terms which appear to be free from ambiguity, fails none the less to attain a true conception of the single personality of the State. While he tended towards an organic conception of the State, he was also deeply immersed in the individualism of the School of Natural Law; and his individualism prevented him from interpreting the immanent unity of a commonwealth composed both of head and

of members in terms of a single living personality. A 'person' was always for him either a natural individual, or a sum of individuals who were only held together in the way of a partnership, and could only be regarded as a unity in virtue of a fiction; it was nothing more. His *subjectum commune* turns out, in the end, to be simply the aggregate of the People. Whenever the rights of the State have to be distinguished from those of the Ruler, he can only think in terms of the body of the Ruled confronting the Ruler as the other party to the contract of government; and he accordingly employs the terms *universitas* or *populus* as synonymous with the terms *civitas* or *regnum*, in the purely collective sense to which we have already referred(121).

This explains why the sovereignty of the State of which Grotius writes never becomes anything more than a bloodless category. Refusing to recognise a real sovereignty of the People as always and everywhere present, and only consenting to admit the existence of popular sovereignty where the People itself was constituted Ruler by positive law(122), he was condemned to see his doctrine of the sovereignty of the State—proclaimed as universally and eternally valid, but in reality only allowed to exist in the one form of popular sovereignty—inevitably dwindling into an empty shadow. It only amounted, in the last analysis, to the notion that the original sovereignty of the community, which had once actually existed under the inchoate conditions of primitive civil society, continued still to enjoy a sort of conceptual existence even after it had disappeared *de facto* with the erection of a State-authority. Grotius uses this notion to prove that an alteration of the form of the State does not extinguish its previous rights and duties, and, more particularly, that a change from popular to monarchical rule, or *vice versa*, does not interrupt the continuity of the 'Subject' of public right(123). But as soon as he goes into any detail, even on this simple issue, we begin to see clearly how far he is from any approach to the conception of a single State-personality(124). Nor does he, in the rest of his argument, even when he is dealing with questions in which we should definitely expect some use to be made of the idea, ever recur at all to his *subjectum commune*(125). It disappears entirely in favour of the *subjecta propria* which are depicted as possessing *dominium*, or as sharing in *condominium*, according to the particular constitution which he has in view at the moment. We are always confronted, throughout his work, by the figures of individuals, or of collective bodies of individuals, acting

externally as the 'Subjects' of international rights(126), and internally as the 'Subjects' of State-authority(127). He allows, indeed, that an active personality of the People *may* still continue to exist by the side of the sovereign personality of the Ruler; he even allows that the personality of the Ruler *may* be merged, in the whole of its range, or in part of its range, into the personality of the People; but whether any of these possibilities is actually realised is made to depend entirely on the way in which the fortunes of the original sovereignty of the People have been affected by the accident of a particular method of acquiring Ruling power. On the one hand, the People may have retained, or recovered, the supreme power; and in that event, the People will be both the *subjectum commune* and the *subjectum proprium* of majesty(128). On the other hand, the Ruler, by an act of conquest, or through a contract of submission, may have acquired State-authority to as full an extent as it ever belonged to the People itself ('*imperium ut in populo est*'); and in that case such authority will be his personal and inalienable right, which he possesses *jure plenae proprietatis*, and of which he can freely dispose, as his own *patrimonium*, both *inter vivos* and at death(129). In a patrimonial State of this kind the personality of the People may still appear in the guise of a *subjectum commune*; but it has obviously lost any footing in the world of real life.

The general view of Grotius, however, is based on the assumption that, in spite of the transference of supreme power to the Ruler, the body of the People still continues to enjoy extensive rights in the State Even a conqueror, he argues, may content himself with the appropriation of something less than absolute right, and he may thus only acquire *imperium ut est in rege vel in aliis imperantibus*(130). When a Ruler has been installed in virtue of a contract, there is a definite presumption in favour of a reservation of popular rights(131) In any case of doubt, it is not the full right of property, but only a right of usufruct, which properly belongs to the Ruler; and in such a case the People has a right of property in the authority(132), the territory(133), and the possessions(134) of the State. Special constitutional provisions may limit the authority of the Ruler even further: for instance, its exercise may require the co-operation of the People, or of some smaller assembly; or again, it may be initially assigned for a limited period, or it may be subject to a 'resolutive condition'(135).* But none of these

* 'A condition on the happening of which a contract or obligation is terminated', *N.E.D.*

possibilities really affects the existence of the sovereignty of the Ruler; and therefore none of these possible rights of the People really secures any effective sovereignty, either in whole or in part, for the *subjectum commune* of sovereignty(136)—though there is always the possibility that, as a result of the institution of a genuine *forma mixta*, the supreme power may itself be actually divided among a number of 'Subjects', and, more particularly, between king and People(137).* It follows that, even in the theory of Grotius, if we leave aside pure democracy and the pure patrimonial State, a dualism between two personalities is constantly reappearing; and indeed we may even say that it is definitely accentuated, by the wider application which he gives to the idea that the right to State-authority may be of the nature of a right of private property.† His doctrine of the *subjectum commune et proprium majestatis* thus remained essentially barren. It found a few adherents(138); but on the whole we may say that it was regarded as a variety of the theory of popular sovereignty, which was not without its own risks, and which was accordingly attacked and rejected along with that theory(139).

5. We may now turn to the advocates of the theory of the Sovereignty of the Ruler We should expect them, *a priori*, if they attempted to attain the idea of a single State-personality, to identify it entirely with the personality of the Ruler; and we actually find them agreed in regarding the Ruler as the one and only 'bearer' of the active life of the State—the force which united, animated, and organised the whole body politic—the visible representative of the State itself. Yet as long as they recognised a personality of the People as existing at all by the side of that of the Ruler, they could not possibly deny that this had also its share in the representation of the State. The result was twofold Not only did they tend, in treating of popular rights, to set the People over against the Ruler as a separate 'Subject' of these rights. In the very act of making this antithesis, they often went further still, and they even described the People as being the 'State' itself.

* In other words, the People, as a *subjectum commune*, remains without any effective sovereignty, but as a *subjectum proprium* it may enjoy, under a mixed constitution, a share in effective sovereignty. We may add that in a pure democracy it may also enjoy, in the same capacity, the whole of such sovereignty.

† The reference is to Grotius' conception of the Ruler as able to acquire, by conquest or contract, a personal and alienable right, *jure plenae proprietatis*. This opposes the Ruler even more definitely, as a still more independent authority, to the People in its capacity of the 'common Subject' of sovereignty.

This being the case, it was inevitable that every attempt to qualify the Sovereignty of the Ruler should prove an insuperable obstacle to the attainment of any conception of a single State-personality. (1) If, in accordance with a theory which had been inherited from the Middle Ages (a theory still held by many writers down to the days of Bodin, and defended even later, in spite of their acceptance of the strict conception of sovereignty, by the ecclesiastical theorists on Natural Law who were inspired by Molina and Suarez), the very nature of the State was held to involve a *limitation*, by the reserved and inalienable natural rights of the originally sovereign People, upon such sovereignty as had been alienated to the Ruler, it followed *ex hypothesi* that the collective body of the Ruled confronted the Ruler, at a number of points, as the true and proper State-personality(140) (2) The same result [of a dualism between Ruler and Ruled] was also possible, to say the least, if the idea was accepted of a contract of government made upon mutual terms, and if accordingly another form of *limitation* of the Ruler's sovereignty—i e. a limitation by the constitutionally determined rights of the People—was recognised as binding upon him(141) (3) Finally, turning to the theories which rejected any idea of a *limited* sovereignty, but admitted, in lieu thereof, the possibility of a mixed constitution, with a *division* of sovereignty between several 'Subjects' and, more especially, between king and People, we observe a still deeper contradiction. Such theories extended the dualism of the State-personality, which it was their fundamental object to avoid, until it affected and divided the personality of the Ruler itself(142)

In opposition to all these tendencies, the systems of thought inspired by the logic of strict absolutism attempted to concentrate State-personality in a single person, either individual or collective. The primary aim of Bodin was to attain, by the unqualified rejection both of limited and of divided majesty, a Ruler-personality which included and absorbed the whole conception of the State (143). But even Bodin himself failed to take the last and decisive step. Clinging to the original sovereignty of the People, he vindicated for it, even after it had alienated State-authority, the ownership at any rate of State-property; and on this point he opposed the *respublica*, as the properly qualified 'Subject' or owner of such property, to the *imperans*(144). In the same way, but, in some respects, to an even greater degree, there appears in the theory of Gregorius Tholosanus, and in the theories of other advocates

of the unlimited authority of the Ruler, a personality of the People, which takes its place, under the name of *respublica*, by the side of the personality of the Ruler(145). Arnisaeus was the only writer who assumed the total absorption of the *respublica* in the Ruler; but in spite of that assumption he treated the *societas* of the Ruled as a separate 'Subject', for which he reserved the name of *civitas*(146).

6. Thus the old dualism was not entirely vanquished, even by those who sought to exalt the Sovereignty of the Ruler; and it was therefore an event of the first importance when Hobbes, boldly demolishing what had hitherto been the foundation of all natural-law political systems, went at last to the root of the matter. He substituted for the two original contracts* a single contract by which each pledges himself to each to submit to a common Ruler, who, on his side, takes no part in the making of the contract(147). This assumption destroyed, in the very germ, any personality of the People. According to Hobbes, there has never existed, at any time, a *societas civilis* based simply upon itself. The personality of the People died at its birth(148). But just as there has never existed an original right of the People, so, when the State has been formed, it is equally impossible to think of any right of the People, even of the most modest description, as either surviving by reservation [since there was nothing to reserve], or as introduced *de novo* by contract, since a relation of contract between Ruler and People is inconceivable(149). With a logical inevitability all public right is absorbed, in every possible form of State, by a Sovereignty of the Ruler which is absolutely unlimited and illimitable, irresponsible and omnipotent, free from all obligation of law and duty, the engulfing reservoir of all rights both of individual subjects and of the aggregate body they form(150). Intolerant of any division, and thus excluding any mixed form of government, this authority is necessarily concentrated, in all its plenitude, at a single centre(151). Its 'Subject' can only be either a single and self-subsisting individual, or a sum of individuals united in a visible assembly and armed with the power which a majority has to control a minority(152).

There is thus, in Hobbes' view, a physically perceptible Ruler-personality, which is to be found everywhere. In it, and in it alone, he next proceeds to argue, the whole State also attains personality(153). For the unity of this artificial body wholly depends upon an agreement—an agreement attained, under the inevitable

* The contract of society and the contract of government

compulsion of the command of Natural Law, in the contract which created the State—that the authority, the will and the action of the *unus homo vel unus coetus* shall count as the authority, the will, and the action of each and every subject(154). The Ruler thus appears as *persona representativa*: it is he who *personam omnium gerit*; whose *persona cunctorum civium persona est*; in whom *tota civitas continetur*(155). No personality of the community can stand by his side: apart from him, the community is a loose heap of individuals, a disunited multitude, and therefore in no sense a *universitas*(156). The personality of the State, like that of any other body, cannot be any other than single; its Ruler is more than the head, he is the very soul, of the body of this Leviathan; and as such he represents its personal identity, which only exists in him(157). In this way there arises, out of the artificial life (*vita artificialis*) of the great automaton (*homo artificialis*), an artificial person (*persona artificialis*) which, under the technical designation of *persona civitatis*, becomes the centre of public law(158).

This was the solution provided by Hobbes for the riddle which so many thinkers had so long attempted to solve(159). Basing himself upon arbitrarily assumed premises, but wielding a remorseless logic, he wrested a single State-personality from the individualistic philosophy of Natural Law He had extended the idea of Natural Right until it meant the right of all to everything, and he had done so in order that it might perish, as a right of all, from the very abundance of its own strength, and then, surviving only in the form of a *jus ad omnia* left in the hands of a single man, or a single body of men, might proceed to convert itself into mere naked power. He had made the individual omnipotent, with the object of forcing him to destroy himself instantly in virtue of his own omnipotence, and thus enthroning the 'bearer' of the State-authority as a mortal god (*Deus mortalis*). In this materialistic and mechanical consummation the natural-law theory of the State seemed to have reached the end of its development. But instead of falling into the sterility of premature death, it drew a new and unexpected vitality from the very crisis which threatened its life. In the march of its onward movement in the future, it might sometimes be constructive, and sometimes critical; but it was always to remain dependent on the system of thought constructed by Hobbes. And the element which was to prove itself most fertile in its future progress was to be the idea of a single State-personality which he had managed to attain—even though that idea, as it stood in his presentation, was purely external and formal.

CHAPTER I: SECTION V, §15

THE NATURAL-LAW THEORY OF ASSOCIATIONS (*DIE ENGEREN VERBANDE*)

There were two ways in which the conception of the State expounded by natural-law thinkers was bound to exercise a determining influence on the theory of other associations. On the one hand, their theory of Sovereignty drew an insuperable line of division between the State and all other groups. On the other hand, their theory of Contract tended towards the inclusion of the theory of the State in a general theory of Society, which permitted associations other than the State to appeal to a similar origin and to claim a similar justification. According as one or the other of these two directions was predominantly followed, there arose divergent tendencies which led to opposite results.

I. GROUPS WITHIN THE STATE

(1) *The unitary or centralist interpretation*

If we turn our attention first to the local communities and corporate groups contained in the State, we find the exponents of the theory of Natural Law agreed that the fact of their subjection to State-sovereignty distinguished them from the State by a genuine logical criterion. The question still remained—How far, in spite of this subjection, could they be regarded as retaining a common life of their own? The answer to that question depended on the view which thinkers held of the nature of sovereignty and of its relation to the processes of group-development.

1. On the whole, the theorists of Natural Law were driven by the tendency of their time to deny that local communities and corporate bodies had a social existence* of their own. So far as it moved in this direction, the natural-law theory of associations was far less favourable to such bodies, on the fundamental issue at stake, than was the positive-law theory of Corporations [which had been expounded by the civilians]. It must be admitted, how-

* Social existence = existence in the area of voluntary society, as distinct from political existence, which = existence in the area of a State, as 'institutions' chartered by it.

ever, that the exponents of natural-law theory, when they came to suggest a practical policy, adopted this positive-law theory; and some of them even advocated a favourable treatment of corporate institutions.

It was a factor of decisive importance, to begin with, that the smaller communities contained in the State were never allowed to appear as having a birthright in Natural Law. It is true that those who maintained the theory of the organic origin of the State did not suppose the *societas civilis perfecta* [i.e. the State] to have issued immediately from an act of union between individuals. They believed that it had developed gradually, through an ascending series of other associations. But there was a general agreement that, after the State had once been formed, the Family alone continued to enjoy a right of existence derived from this original process of free social development. So far as other associations were concerned, thinkers were ready to allow that there had been a progressive widening of the original family-community, first into the local community, then into the city, and finally into the greater kingdom; but they still remained tied to an abstract scheme of thought, deduced from the conditions of the ancient City-State, which made the local community merely a preliminary stage of the civic community, and treated the civic community as the perfect realisation of the idea of State. The Family and the State were therefore regarded as the only societies which possessed a basis in Natural Law. So far as writers on politics dealt at all with the Family in connection with their theory of the State, they treated it as one of the natural bases of the State, describing it as a *societas privata* or *domestica*, and dividing it into the three societies of husband and wife, parents and children, and master and slaves(1); but they hastened to set over against it at once, as the *societas politica* or *civilis*, a community armed with sovereign power(2). Local communities and corporate bodies, as distinct from the Family, were regarded as only arising after the constitution of a system of political order, and within the limits of that system. They were useful, but not indispensable, divisions of the body politic; they had no place in the general natural-law scheme of civil society; they were only the particular institutions of a particular State, based on its positive law(3). This was the general tendency of all natural-law theory; but when the idea of a Social Contract was emphasised, and the sovereign State was directly based on the conclusion of a contract between individuals, the tendency became

even more marked to relegate any corporate articulation of the State to the sphere of mere positive law(4).*

Deprived in this way of the sanction of Natural Law, associations were unable to vindicate an inviolable right of existence against either the State or the Individual. With the sacred and indestructible rights of the sovereign community confronting them on the one side, and the no less sacred and indestructible rights of the individual personality confronting them on the other, it became a question of mere utility what measure of rights they ought to be granted. The way was clear for attempts to demolish the traditional historic rights of intervening groups, in order to realise the ideal law of Reason and its rational system of rights.

[*a*] So far as their relation to the State was concerned, associations automatically lost any claim to possess an inherent social authority of their own the moment that the absolutist conception of sovereignty began to be seriously pressed. If the whole range of power required for the guidance of civil society was to be found in a single and indivisible 'majesty', the authority of the State must necessarily be exalted into being the one and only manifestation of that power of the Whole to control its members which belonged to the nature of human society, and on that in turn it followed that any association contained in the State could never be allowed to enjoy an inherent and independent existence in the sphere of public law, but could only do so, at most, in the sphere of private law.†

Even Bodin himself, in spite of his preference for a vigorous activity of corporate life, was unable to escape this logical consequence of his own conception of sovereignty. His full and searching enquiry into the corporate articulation of the State, with its advantages and disadvantages (III, c. 7), begins with a distinction and definition of the *collegium*, the *corpus*, and the *universitas*, which became a model for many subsequent writers. A *collegium* is the legal union of two or more persons of like status: a *corpus* is the union of several colleges: a *universitas* is a local com-

* 'Corporate articulation' of the State means a system (such as Althusius depicts) in which the State is a *communitas communitatum*—a body of which the parts are not individual atoms, but corporate limbs and members all fitly joined and knit together The Fascist idea of the 'corporative state' is an attempt to translate this idea into practice.

† I.e an association could not enjoy inherent rights as against the State, and as a matter of *Staatsrecht*, it could only enjoy such rights (if at all) as against individuals, and as a matter of *Privatrecht*.

munity (*omnium familiarum, collegiorum et corporum ejusdem oppidi juris communione sociata multitudo*); while in the *respublica* there is added, to the attributes of a *universitas*, the further and higher attribute that it embraces and protects with its sovereignty (*imperii majestate*) all individuals and associations (no. 327).*

The three species of the 'more imperfect' associations arose, in Bodin's view, at a time long before the foundation of the State, and as the result of an imitation (which was itself due to man's social instinct) of the original and natural society of the Family: they continued to exist in the State as elements in its life which, without being, like the Family, necessary or indestructible, were none the less exceedingly useful; and the earliest founders of States accordingly regarded them as the strongest supports of their newly created system of order (nos. 328–9). Any thinker who considers the historical sequence of development which runs through *familia*, *collegium*, *corpus*, *universitas*, *civitas* and *imperium*, and who refuses to believe that a commonwealth can permanently exist *sine caritate et amicitia*, will never approve the views of those who treat all corporate articulation of the State as something that may be dispensed with (no. 342). It is true that corporations involve a risk of disorder; but to advocate the elimination of all corporations on that account is to overlook the fact that it is only *collegia perperam instituta* that ever threaten any danger. In view of that possible danger, it is good to be cautious in sanctioning the existence of all societies. More especially, the practice of religious confessions which are of foreign origin should only be allowed in exceptional cases. But the suppression of all *collegia* is a symptom of tyranny (nos. 342–4). The best constructed kingdoms find their firmest support in *collegia et corpora*; such bodies produce most readily the contributions which are needed for the general well being (nos. 345–6).

Holding such views, Bodin is even willing to argue in favour of a system of Estates with regular meetings, in order that a king may learn the wishes and grievances of each of these bodies and increase his prestige by the advice and the grants which he receives from their general assemblies. In particular, he recommends a system of provincial diets, and advocates its general introduction into France, adducing in its favour not only the example of Switzerland, but also (and especially) that of Germany, with its free towns

* The *numerus* is the number given at the *side* of the page in the later editions of the *De Republica*.

and its ten circles. He holds, however, that due proportion should be observed in regard to the number of groups and assemblies. Indiscriminate permission of all can only lead to anarchy; and a limitation of guilds, for example, has been everywhere found necessary (nos. 346–7). In spite of his enthusiasm for decentralisation and self-government, Bodin still regards all corporate institutions as nothing more than voluntary creations of the sovereign, which he can modify at will. In his view, the very nature of sovereignty necessarily involves the corollaries that the sovereign can no more be bound by law in dealing with *universitates collegia et corpora* than he is in dealing with individuals; that he can abrogate *ex aequitate* any law he has passed in regard to them, and withdraw any privilege he has granted; and that he never legally needs the co-operation of the assemblies whose advice he consents to receive (I, c. 8, nos. 85–99). It follows that the existence of all *collegia* and *corpora*, like that of all *universitates*, depends on a concession made by the State; they are *coetus in Republica jure sociati*, i.e. *summi Principis beneficio et concessu, sine quibus corporum et collegiorum jus ac nomen amittunt* (III, c. 7, no. 331). Only such authorisation by the sovereign power can produce the *legitima consociatio* [or lawful right of assembly] which is involved in the idea of an association, and which not only includes the right of meeting, but also the right of determining the time, place, character, and agenda of such meeting (*ibid.*). Indeed, the authorisation of the sovereign is the source of *all* corporate authority whatsoever (no. 332). It is usually granted *ad hoc* in each particular case; and the amount of rights conveyed in the grant is variously adjusted, according as religious or secular associations are in question, and, in the latter case, according as official or unofficial 'colleges' are concerned (nos. 330–2). In any and every case, the exercise of any governing authority by a 'college' is only possible in virtue of its being directly conferred by the State; and it must always be subject to supervision by the higher authorities of the State.

Bodin's conception of all corporations as State-institutions becomes most clearly apparent, when he proceeds to treat of the collegiate magistracies (*collegia magistratuum et judicum*) as the most distinguished corporations in the State, and to ascribe to them, and to them alone, a *jurisdictio et imperium* of their own(5), while other corporations are only allowed a power of decision in internal affairs and a modest power of discipline over their members(6).*

* In the France of Bodin's time, the collegiate magistrates were partly (1) financial boards, e.g. the *trésoriers de France*, who formed a *collège* in each

This tendency of Bodin to lump together collegiate magistracies and general associations will also serve to explain why he refuses to regard an independent capacity for owning property as an essential attribute of a corporation. He admits that '*aliquid commune*' belongs to every *consociatio*; but it is enough for him if a law, or a particular disposition of the sovereign, assigns regular revenues to meet the cost of managing such common affairs as each may happen to have(7). We begin to discover that the possession of a personality of its own has ceased to be, in any sense, a necessary part of the idea of a corporation. It is only a possible accretion. It is a further illustration of Bodin's general attitude that, when he comes to deal with the offences of corporations and the punishment of such offences, he never pays any regard to the idea that associations may have an inherent right of existence(8).

We may trace a similar view of the relations of the corporation to the State in other political writers who adopted the strict absolutist conception of sovereignty. Gregorius Tholosanus, on the whole, follows Bodin's line; but we may already detect, in his various political writings, a bias which is even more inimical to the liberty of corporations(9). Bornitius elaborates, with even greater logic than Bodin, a theory of *collegia*, *corpora*, and *universitates* which makes them mere State-institutions(10). Arnisaeus regards associations as mere divisions (*classes*) created by the State among its subjects for the easier exercise of its governing power(11). Even the theorists who sought to modify the absolutist conception of sovereignty were apt to regard local communities and corporate bodies as no more than administrative institutions—useful in certain circumstances, but dangerous unless they were rigorously limited—which the sovereign could create, transform or abolish in the light of his own free judgment of their utility(12) Besold took more of a middle line, attempting to reconcile the new political doctrine [of sovereignty] with the old Roman-law theory of corporations(13). The regular teachers of Natural Law were less friendly to associations; and if they thought it worth while to mention them at all, they always refused to allow that they possessed any inherent group-authority(14). The ecclesiastical writers on Natural Law were especially influenced by the current

financial district or *généralité*, and partly (2) judicial bodies, such as the *Parlement* of Paris and the provincial *parlements* Within these judicial bodies there were sub-colleges, e.g. the *maîtres des requêtes* formed a *collège*, with a corporate organisation and a corporate character, inside the *Parlement* of Paris.

tendency in favour of centralisation (15); and Suarez is conspicuous among them for his emphatic insistence that any power of action which goes beyond the limits of pure private law is reserved entirely for the State (16). He is thus led to reject entirely the conception that associations have a genuine power of self-government, and he seeks to refer any power of making decisions which they may enjoy either to an act of authorisation by the sovereign, or to a private contract made between the individual members (17). He applies the same fundamental principle to his interpretation of customary law, which he regards, with the aid of a series of forced assumptions, as a *lex tacita* (18). Similarly, in treating of the right of taxation, he refuses to admit the validity of any tradition or privilege which can have the effect of calling in question the unique authority over taxation which belongs exclusively to the State (19). He applies the same system of strict centralisation to the Church [e g. in regard to its relations to religious orders and other religious associations], when he elevates it to the dignity of a sovereign spiritual State (20)

[*b*] If associations were thus denied any public authority, and all such authority was vindicated exclusively for the State, it became impossible to hold that they had any inherent existence of their own as against the *Individual*. In effect, the absolutist theory of the State tended towards a view which reduced all rights of corporations, so far as they were not derived or reflected from the sovereignty of the State, to the level of a system of partnership based upon individual rights. From this point of view corporations, like families, were often brought under the rubric of private 'societies' or companies (21); and Busius openly holds that the rights of *collegia et corpora* are only a matter of *jus societatis* with certain modifications (22).* There was indeed some tendency to recur to the traditional [Roman-law] theory of corporations when it came to a closer examination of deviations from the normal contract of partnership, such as hospitals or sanctuaries (23); but the peculiarities to be found in such cases were treated as being of the nature of mere external accretions. Even when thinkers really attempted to face the fundamental question, 'What personality of its own does the corporate Whole possess?' they generally gave the most superficial of answers, sometimes contenting themselves with a distinction between the 'collective' and the 'distributive'

* Society (*societas, Sozietat, Gesellschaft*) in this context means the simple business partnership of individuals united by a private contract.

enjoyment of rights by a body of persons (24), and sometimes taking refuge in a conception of the corporate Whole as a 'feigned' individual (25).

On the whole the tendency ran in favour of a merely collective conception of associations. Attempts were made, for example, to explain the validity of the majority-principle by supposing that, for certain purposes and in certain cases, it was possible to identify *plures* with *omnes* (26). Those who took this view were enabled by it to interpret the regularly made decisions of corporations as contractual agreements [made by *all* the members] (27), and even to base their theory of the delicts of corporations on a similar view (28).* [We may cite an even more striking instance of such ingenuity of interpretation.] By applying the idea of partnership to the village community some of the ecclesiastical writers on Natural Law even found themselves able to make a vigorous defence of the Fellowship principle in regard to the legal position of village commons (29) †

Suarez [did not apply the idea of partnership so indiscriminately. He] drew a clearer distinction between the rights of a mere community and those of a corporation. He distinguished the *communitas imperfecta*, which was not organised as an independent unit, from the *communitas perfecta*, which was competent to develop and exercise a community-control of its members; and on the basis of this distinction he included local communities and corporate bodies, 'imperfect' though they might be when regarded as parts of the political whole, among the *communitates* which, regarded in themselves, were 'perfect' (30). But Suarez himself, when he comes to investigate the real essence of corporate groups, remains in a state of vacillation. He hovers uncertainly between the idea of a multiplicity of persons, reduced by contract into a unity, and the fiction of a separate personality (31).

* If *plures* = *omnes*, then (1) a majority-decision = a contractual agreement of all, and (2) a majority-decision to pursue a course of conduct which results in a delict = a contractual agreement of all to commit that delict.

† If you apply the idea of partnership to a village, you can insist that all the villagers, as partners, are something of a Fellowship, with 'common rights'. (On the other hand, it will also be possible for a Fellowship which regards itself only as a partnership to wind up the business, and to distribute the common property among the existing partners.)

(2) *The federalist interpretation, especially in Althusius and Grotius*

In opposition to this trend towards centralisation and the absolute State there arose, among some of the adherents of the School of Natural Law, a federal theory. Developing the idea of the Social Contract to its logical conclusion, they sought to place associations generally on the same natural-law basis as the State itself; and they attempted accordingly to vindicate for them, even when they were included in the State, an independent sphere of action which belonged to them in themselves.

The way was prepared for this view, in the course of the sixteenth century, by the claim (which had been advanced in practice in the Wars of Religion, and was defended in theory by the Calvinistic advocates of popular sovereignty) of a right of resistance of particular provinces against a tyrannical political authority. In this connection the theory propounded by Hubert Languet exercised a deep and particular influence. Provinces and cities, he held, were appointed to superintend [along with, and even in lieu of, the national Estates and magistrates] both the pact between the nation and God and that between Ruler and People * They were therefore entitled, and even obliged, to offer armed resistance to the Ruler who broke his contract, and in the last resource they could even renounce their allegiance (32). The success of the Revolt of the Netherlands gave the seal of historical approval to these views. Two things combined to make it easy for a general federal theory to develop from this beginning. The genius of the constitution of the Calvinistic churches was favourable to it; and the political institutions of the Netherlands, as well as of Switzerland and Germany, supplied no inconsiderable ground of positive law in its support.

It was the work of Johannes Althusius to give logical unity to the federal ideas that simmered in the ecclesiastical and political circles in which he lived, and to construct an audacious system of thought in which they all found their place (33). Althusius has a firm grip of the idea that the differentia of sovereignty provides a clear line of division between the idea of the State and that of all

* More exactly, the Ruler is included in both of these pacts—(1) that in which, as *co-promissor*, he is bound, along with the nation, to God, and (2) that in which, as a single *promissor*, he is bound to the People. The first pact, therefore, is not so much 'between the nation and God', as between the nation, *plus* the Ruler, and God.

other associations. Just as he insists that only a federation can stand above States, so he denies that any part of a political whole, when once that whole has become a State, can ever possess the attribute of political authority. But while he regards *majestas* as the highest power on earth, he none the less brings it under legal limits; and while he recognises it as a unity which is absolutely indivisible and inalienable, he refuses to make it the one and only manifestation of that power of a community to control its members which is always involved in the very existence of human society. On this basis, he vindicates for associations a sphere of right which belongs to themselves, and an organic place in the structure of civil society. So far, we may say that he is in agreement with the original core of medieval thought(34). But while medieval federalism started from the unity of the Whole, Althusius takes his stand entirely on the basis of natural-law Individualism. He derives all social unity from a process of association which proceeds, as it were, from the bottom upwards. He regards the contract of society [i.e. the principle of partnership] as the creator of the whole system of public law and order [both in the parts, or earlier stages, of the State, and in its total and final structure].

In the very beginning of his *Politica* he sketches a general theory of association (*consociatio*), which he then proceeds to apply to all forms of society, including the State. He regards the juridical basis of social life as consisting, in every case, in an expressed or tacit compact. By that compact a common life is brought into existence; the means and the powers required for that common life are pooled; and a ruling power is instituted, capable of administering all the affairs which have been made, in this way, a common concern. Within this general framework, he distinguishes five species of association (*species consociationis*), each with its special functions, and each, therefore, with a special area of action and an independent authority of its own. They are the Family, the Fellowship (*Genossenschaft*), the local community (*Gemeinde*), the Province and the State. In this ascending series of groups, each higher stage always proceeds from the one below; and thus it is associations, and not individuals, which are the contracting parties in the formation of the higher and larger groups. More especially, it is the provinces or local communities which conclude the contract of society that founds the State; and they surrender to the State in that act (just as the groups on which they are based have similarly surrendered to them) only such part of their rights as is

definitely required for the purposes of the higher community. The existence of the State is thus compatible with the survival of a series of concentrically arranged groups, intervening between the individual and the general community, each of them a unit sanctioned by Natural Law, and all of them supporting and sustaining the greater whole. The social life which these groups enjoy is not bestowed on them by the State: it is a life which proceeds from themselves. In fact, they give rather than receive: they are the source of the broader forms of social life; and while they are capable of living apart from the State, the State cannot live apart from them. They have therefore rights of their own which belong inviolably to them in their own particular area, even if their inclusion in a greater whole involves a number of limitations upon their freedom. They can themselves resist tyrannical attacks upon those rights by force of arms, even though this may involve a conflict with the authority of the State; and their officers are not only entitled, but also obliged, to protect them in their rights, and to offer active resistance to any encroachment upon them by the supreme Ruler. In case of need, particular territories may even secede, and either submit to another Ruler or declare themselves independent; for since *regna universalia* have been founded by the joint action of *familiae, collegia, pagi, oppida, civitates et provinciae*, each of these constituent units recovers its original liberty in the event of a breach of their contract of union.

In conformity with these ideas, Althusius holds that it is necessary to follow a method of expounding political theory which corresponds to its subject-matter, and proceeds from the lower to the higher. He therefore gives a detailed account of the rights of [lesser] associations before he treats of the State. He begins with the simple and private association (*consociatio simplex et privata*) which unites men in pursuit of some particular common interest. This private association is depicted as having two phases or stages. The first is the natural and necessary union of the Family, including both the narrower circle of the household and the wider circle of the kin-group. The second is the Fellowship (*consociatio collegarum*). Althusius describes the Fellowship as a civil and voluntary union, constituting a social body: he traces it through its various manifestations, from ecclesiastical and secular *collegia specialia* to the *collegium generale* composed of a whole Estate; and he vests it with corporate autonomy and self-government(35). Having established this basis, he now proceeds to the composite

public association (*consociatio mixta et publica*), which unites the simpler groups in a general or universal scheme of life (or, as he terms it, *politeuma*), and which is therefore also called by the name of *universitas*. In this category—which may also be called by the name of *consociatio politica* or political association—Althusius is able, with the aid of a distinction which he draws between its 'particular' and its 'universal' form, to include both the local community and the State (36).

In dealing with 'particular political associations', he begins with a full account of the local community—the *universitas* in the narrower sense of the word, in which it refers to rural and municipal bodies. Here he first gives a sketch of the general institutions common to both of these bodies; and he then proceeds to treat of the peculiar features of rural and urban communities—first of all treating the development of the *universitas rustica* in its three phases of the *vicus*, the *pagus*, and the *oppidum*,* and then dividing *universitates urbanae* from one point of view into 'free', 'provincial' and 'mixed' cities,† and from another into 'mother-cities' and 'colonies' The general principle which he asserts is that all these microcosms of the political community, rural and urban alike, should be regarded as possessing a large area of authority in their own right, though he admits that the co-operation of the higher authorities is required for the acts of small and dependent communities. Leaving these lower stages of *consociatio politica particularis*, Althusius now turns to the higher stage of the *universitas provinciae*. His picture of the Province, which professes to be based on the principles of Natural Law, is actually based on the model of the German territorial principality; and this will explain why he can both allow it a very large measure of independence, and yet, at the same time, make its governor the holder of an office conferred by the *summus imperans* of the whole realm.

Upon this basis Althusius begins his account of the State. It is a *universalis publica consociatio* produced by a contract of union between 'particular' communities; and it displays its essential principle in the form of a 'majesty' which embraces all these communities. We have already noticed the importance which he

* We may translate the terms into the English equivalents of 'village', 'hundred', and 'country-town'.

† The free city is a direct member of a federation, on the same footing as a province: the provincial city is included in a province: the mixed city will somehow combine both characteristics

attaches to this essential attribute of the State(37). But in every other respect he is inevitably impelled, by the very genius of the federal system which he has developed with so rigorous a logic, to advocate and to apply the principle that associations are in their essence on a level of full equality with the State. In fact, his general theory of corporate bodies already contains in the germ the whole of his theory of the State. At each of his various stages of association, the contract of society [by which each stage is produced] already displays its power of developing a common life, in virtue of which the participants in that life constitute a single body, and count as a single person. In every stage this development results in a power of the whole over its members; and although at the stage of the Fellowship, as well as at the prior stage of the Family, this power is still only a *potestas privata*, it rises to the dignity of a *potestas publica* when we come to territorial associations—with the one qualification that it is kept within definite bounds in local communities and provinces, as a *potestas publica limitata*, by the authority of the higher *potestas publica universalis*. In every stage, again, the authority of the whole over its members has to be regulated by *leges directionis et gubernationis* (over and above the *leges communicationis*),* and this involves, from the first, a distinction between Rulers and Ruled. In every stage, however, authority is only a mode of service and a form of care for the welfare of the community; and obedience is simply a return for the provision of defence and protection At every stage, therefore, it is the community of the Ruled which is the true 'Subject' or owner of the common authority, in virtue of that divine order of the world which is *ex hypothesi* revealing itself naturally in the whole of this natural-law system; and as the true 'Subject' of the common authority the community is superior to the officer entrusted with its actual exercise. Just as, in the State, 'majesty' is inalienably and inviolably the property of the People, so, in the Fellowship, the elected committee of management is necessarily *major singulis, minor universis collegis*. In the same way, the government of a local community, whether such government be an individual or a college, possesses a *jus in singulos, non in universos cives*; and the chief officer of a rural community is therefore subordinate to the com-

* The *leges communicationis* deal with the pooling of means and forces required for the common life, the *leges directionis et gubernationis* deal with the ruling power necessarily instituted for the administration of all the affairs which, in consequence of such pooling, have become the common concern.

munal assembly, as the urban magistrate is subordinate to the civic representatives, and these are in turn subordinate to the whole civic body. Similarly, again, when we come to the Province, the deputies of the various corporate Estates (which should properly include, in every case, a fourth 'Estate of husbandmen or peasants' as well as the clergy, nobility and towns)* form an assembly of provincial Estates· the assent of this assembly is necessary before the territorial prince, or head of the province, can declare any war, impose any tax, proclaim any law, or undertake any other measure of importance; and the assembly has also a right of resistance and revolt against any governor who fails to discharge his duty.

So perfect a parallelism between all associations and all stages of development reduces the theory of the Corporation and the theory of the State to the position of mere aspects of a single and uniform theory of all Society. It is true that Althusius, following the jurisprudence of the civilians closely, allows a number of propositions drawn from the traditional Roman-law theory of corporations to find a place in his theory of politics But these propositions acquire a fundamentally new significance by being incorporated into a system based on the principles of Natural Law. They are all made to fit into the general idea of a contract of society, proceeding steadily upwards from the individual to the State through an uninterrupted series of progressively higher and progressively broader social formations. There is thus no contradiction—on the contrary, there is full and absolute agreement—between Althusius' system of political ideas, as it has just been described, and his juristic theory of associations, as it has been explained in a previous section (38).† Whether we look at his views in terms of political theory, or in terms of jurisprudence, the result is the same. Any difference in kind between public and private law, between the commonwealth and a company, between the general will and an agreement of different wills, disappears. The one conception of the 'society' or partnership, founded on individual rights, is made to cover the whole of Group-life. Dividing itself first into the two varieties of the *societas bonorum* and the *societas vitae*, and then proceeding to lump together, as all belonging to the latter of these varieties, the Family, the Fellowship, the

* In Sweden there were four Estates—clergy, nobility, burghers and peasants.

† Gierke here refers to vol. IV, pp. 178 *seqq.* of his *Genossenschaftsrecht*, which is not included in this translation.

local community and the State, this partnership conception is stretched so far that it has to include simultaneously both the simple business company and the genuine corporate group. In each and every case, the union of men for the purposes of a common life is regarded as producing a living Group-person; and yet in the issue none of these Group-persons proves itself to be anything more than a collective sum of associated individuals. The Teutonic idea of the freedom of corporate bodies is introduced into the sphere of the Law of Nature; an inherent existence is vindicated for associations over against the State; and yet, in spite of every effort to attain the idea of a true and organic Group-being by the use of the Teutonic conception of 'Fellowship', there is a final failure to make either the State or the corporation a whole which is really one, and can assert itself against the individual in the strength of its own inherent existence

In the exposition of a general theory of society based on the principles of Natural Law, Althusius had shown himself far in advance of his age; but some degree of approximation to his system of thought was really inevitable for every thinker who seriously believed that the State was derived from a contract of society. If a contractual agreement between individuals had power enough to produce a sovereign commonwealth, it must also possess the power of producing Fellowships and local communities. The State, by its positive law, might make the formation of corporate bodies subject to its previous consent. it might, by the same means, limit the right of such bodies after they had been actually formed; but the essential source of the existence of associations and their particular form of common life remained an act of voluntary agreement among the members themselves. Associations too had a basis in Natural Law: they were coeval with and akin to the State; and like individuals they might be regarded, not as the creatures, but rather as the living limbs, of the ultimate social Whole. There were some political theorists who, following this line of thought, described any State which transcended the bounds of a simple City-State as a *respublica composita* (39). There were others who, adhering either wholly or in part to the federal scheme of Althusius, interposed a gradually ascending series of associations between the individual and the State (40). A similar point of view was occasionally adopted even by writers whose general political tendency showed a definite hostility to corporations (41). But whatever the particular point of view, individualism was the general basis; and whenever the question arises, in any of these connections, 'What

is the inward essence of a community?' the individualistic premises of the argument always lead inevitably to the obvious answer, 'It has the character of a partnership'(42).

It was a factor of primary importance that Grotius gave his adhesion, on some essential points, to the federal theory. Like the followers of that theory, he held that the various elements in the structure of civil society were based on the same natural-law foundation of contract as the State itself. In the second book of his *De Jure Belli et Pacis*, where he deals with the different titles to the acquisition of property (*dominium*) and authority (*imperium*), he makes a division, in the course of the fifth chapter, between three primary methods of acquiring a right over another person. The first is procreation, which is the basis of parental right· the second is contract, or *consensus*· the third is delict, which explains the imposition of slavery on persons or peoples by way of punishment. The second (or contractual) basis of the acquisition of *jus in personas* is further divided into *consociatio* and *subjectio*. From the contract of *consociatio* Grotius derives first marriage (§§8–16), and then all the other forms of *consociatio*, both *publica* and *privata*. Under the head of 'public associations' he includes both the *consociatio in populum* and the *consociatio ex populis* [i e. the federation]; but while giving the State [whether federal or unitary] a special position under this head as *societas perfectissima*, he also includes under it the *societas inter populos* [i.e. international organisation] (§§17–25)(43). The contract of *subjectio* he makes the basis both of the rights of the master under the system of private law (in the matter of slavery and adrogation*) and of the rights of the Ruler under the system of public law.

This scheme is in some respects opposed to that of Althusius. Grotius recognises that there are other methods besides *consensus* by which power can be initially acquired. Again [even in the sphere of *consensus*] he holds that *subjectio*, as well as *consociatio*, has the effect of imposing an original obligation; and he proceeds, upon this basis, to make a general division of all forms of social grouping into *societates sine inaequalitate* and *societates inaequales*(44). But while, in both of these ways, he lays a broader foundation than his predecessor, the theory which he builds upon it is still a general natural-law theory of society at large, in just the same way as that of Althusius. It embraces the whole area of legal connections between persons, whether under private or under public

* Adrogation is 'the adoption of an independent person, reducing him to a dependent status (*filius-familias*)'.

law: it includes the theory of the State as simply a part (if the final and culminating part) of its general range. It is a theory of society which permits associations to enjoy an inherent and independent common life as against the State: indeed it may even be said to make the body politic itself nothing more than a *societas immortalis et perpetua* composed of parts which are commonwealths themselves. None of these parts can be separated from the Whole against its will: any of them may leave it, in case of need, by its own unilateral act. This involves a *jus partis ad se tuendam* which is prior to the *jus corporis in partem*; and Grotius justifies such priority by the significant argument '*quia pars utitur jure quod ante societatem initam habuit, corpus non item*' (45).

But every society, including the State, is regarded as deriving its existence, in the last resort, from the Individual; and none of them rises above the level of a system of relations established by agreement between the owners of individual rights. Grotius is no more able than other thinkers to establish a firm and logical line of division between partnership and corporation. Every local community or Fellowship, like the State itself, is simply a species of *societas* (46). If, notwithstanding, there appears on the scene a Whole, which is comparable to a natural body, with a unity that continues through all the change of its members (47), the appearance of such a Whole is attributed solely and simply to the effect of those provisions in the contract of society which were designed to secure this object. We have already noticed a primary principle which Grotius enunciates in this connection. He ascribes the validity of the majority-principle to an agreement (which, he holds, is to be assumed in every case) that the majority is to count as equal to the Whole in dealing with the affairs of any association (48). For the rest, we can only say that he makes all the rights and duties of corporate bodies depend upon a mere difference between the 'collective' and the 'distributive' aspect of a group of individuals.* This is made to explain why the same associated

* Summarising the argument of Gierke at this point, we may say (1) that a whole only emerges for Grotius when, and in so far as, there is a specific agreement that the whole shall act, (2) that he believes in an original specific agreement, in all groups, empowering the majority to act for the whole in dealing with group-affairs, (3) that if it be asked what group-affairs are, the only answer he gives is that they are all those affairs which can be brought under a collective point of view, as contrasted with a distributive—i.e. they are affairs that belong to all *ut universi*, as contrasted with affairs that belong to all *ut singuli*.

individuals who possess rights *ut universi* have no lot or share in those rights *ut singuli*: it is made to explain why the debts of the *universitas*, on the principles of Natural Law, cannot be a ground for the liability of *singuli*(49): it is made to explain why, in the matter of delicts, the guilt of the community cannot be presumed of the individual members when regarded as individuals(50). But while the *universitas* thus receives some measure of recognition as a separate person, it really remains throughout an aggregate of individuals, which is only integrated into a unity in certain definite legal connections(51). As soon as we reach the point at which this artificial and juristic mode of thought ceases to be applied, we find at once that it is only individuals who really and truly exist(52).

(3) *The interpretation of Hobbes*

We have seen from the preceding argument, first that there was a current, arising from the natural-law theory of Sovereignty, which made strongly towards the absolutism of the State, and secondly that there was also a strong counter-current, proceeding from the natural-law theory of Contract, which made in the opposite direction. We have now to notice how Hobbes, once more,* defeated this opposing tendency by using against it its own argument of Contract(53).

Hobbes applies his own theory of contract not only to the State, but also to all other groups. His general view of associations is that they are partnership bodies, analogous to the State, which owe their existence to contract. Starting from the category of 'System', in the sense of a union of a number of persons for an object common to them all, he draws a distinction between systems which are *regularia* and those which are *irregularia*, using as his criterion the fact of the presence or absence of a 'representative person'. The regular systems are then subdivided into *Systemata absoluta sive independentia*, which are subject to no authority but their own 'representative person', and *Systemata subordinata*, which are subject—not only as regards their members, but also as regards their 'representative person'—to the authority of the State. The

* 'Once more'—because, as we have already seen at the end of § 14, Hobbes used the doctrine of Contract against the cause of popular sovereignty which it had hitherto been used to support, just as here he is shown to have used the same doctrine of Contract against the cause of Group-rights which it had hitherto served to vindicate.

first of these two subdivisions includes only States. The second subdivision may again be subdivided into *corpora publica* which '*ab auctoritate summae potestatis civitatis constitutae sunt*', and *corpora privata*, which '*ab ipsis civibus vel auctoritate aliqua extranea constituuntur*'. All *corpora privata* are *licita*, provided that *a civitate probantur*. otherwise they are *illicita*. *Systemata subordinata* may also be subdivided, from another point of view, and according to the nature of the object pursued, into *provinciae*, *oppida*, *universitates*, *collegia* and *ecclesiae*. Three other subdivisions may also be added to these five—great merchant companies possessing monopolies (*collegia mercatorum ad regulanda negotia*): *Systemata subordinata pro tempore praefinito constituta*, such as, e.g. assemblies of deputies convened by the King in order that he may take counsel with them, '*tanquam cum una persona cives omnes repraesentatura*'; and finally Families, in so far as the State has left them with a personality of their own *

We now come to *Systemata irregularia*. They are either unions (*foedera*) which have no *unitas personae*, or assemblies (*concursus*) without any definite organisation or system of mutual obligation. It depends on the purpose of the individuals concerned whether they are allowed or forbidden. In general, special combinations and unions for mutual protection among the citizens of a State are superfluous and questionable, because the State *civium omnium foedus commune est*; and therefore they are forbidden as *conjurationes vel factiones*. The simple act of assembling for a legal and overt purpose, e.g. for a festive procession or a theatrical representation, is in itself permissible; but even this ceases to be allowable if a greater number than the object requires are gathered together, or if the State issues a prohibition.

According to these views, the *existence* of associations depends essentially on the same natural power of association which also created the State True, any liberty of association [i.e the right to create associations] only exists in so far as the State allows it to do so; nor can we speak of any independent right of groups, as against the State, any more than we can speak of such a right of individuals. But the life of *Systemata subordinata* is not a derivative life, which proceeds exclusively from the State; we may rather say that such bodies, like the State, have to some degree their own necessity or utility(54). On the other hand, while the *existence* of

* So far, in other words, as they are left by the law in the position of the Roman *familia*, with the *paterfamilias* as its representative person.

a group can thus proceed from a force which is inherent in its members, it is impossible for a group to generate from itself any *authority* to control those members. In the act of making a political contract, all individuals transferred to the Ruler unconditionally all power of every sort; and while they may still possess a capacity of combination for particular objects, even after they have made that transference, they have no longer any power to bestow. It follows that the powers of corporate bodies, so far as they enjoy any powers, are really powers of the State, which it has entrusted to them. Following this line of argument, Hobbes insists that the whole of the *potestas* of subordinate Group-persons is a power derived from, and determined by, the State. He refuses to allow that any man can represent any section of the People further than the State (*cujus persona cunctorum persona est*) thinks fit that he should. He holds that the powers belonging to any agent of a corporate authority are determined, not by a commission proceeding from the community [i e. the corporate body], but partly by precepts or charters issued by the sovereign, and partly by the general laws of the State(55). Otherwise there arises a State within the State (*civitas in civitate*), and the unity of the State is rent in two. It follows that the 'system' and its members are alike immediately subject to the authority of the State. '*Systema et membrum concives sunt*'. It follows again that, while the sovereign is judge in his own case in any *systema absolutum*, disputes between a *systema subordinatum* and one of its members must be settled in the courts of the State. In the same way claims of the 'system' against its members must be made effective by the process of an ordinary action at law, and not by the exercise of any compulsory power supposed to belong to the 'system'(56).

With the authority of the corporation thus absorbed in that of the State, Hobbes is able, as he proceeds with his argument, to fit both State and association into the same framework of a general theory of Society at large, without any sacrifice of his cardinal principle of political absolutism.

In his theory of corporations, as in his theory of the State, the central conception is that of the unity of group-personality. He regards the essence of every *Systema regulare* as consisting in the *persona civilis* (or *artificialis*) which is created by the appointment of one man, or one body of men, to be the *persona repraesentativa* of a multitude. The basis of this view is a general theory of 'persons, authors, and things personated', which comes in the

sixteenth chapter of his *Leviathan*. According to that theory, a person is one who acts. One who acts in his own name is *persona propria sive naturalis*; one who acts in the name of another is *persona ejus, cujus nomine agit, repraesentativa*. In relation to the representative person, regarded as *actor* or agent, the person represented is *auctor* and the right to act is *auctoritas*. In virtue of such *auctoritas* the action of the *actor* is reckoned for legal purposes as being the action of the *auctor*, except that, when the authority is only a pretended and not a real authority, the *actor* himself incurs a personal obligation. Only *aliquid quod intelligit* can be a person; but what is represented (*cujus persona geritur*) need not possess intelligence. In that case, however, it cannot be an *auctor*. Thus when an inanimate thing, such as a church, a hospital, or a bridge, is personated, the rector, master, or overseer is the *persona repraesentativa* of that thing but it is not the thing personated which is here the *auctor*—it is the owners, or governors, of that thing. In the same way, it is not the child, but the State, which is the *auctor* of the representative personality of the guardian. Similarly, when the gods of the heathen were personated in times past, the necessary *auctoritas* proceeded from the State. On the other hand, a multitude of men may form a single person [without any intervention of the State] by acting as *auctor* and giving an 'authority' to represent them into the hands of one man or person. Here, as Hobbes says, 'it is the "unity" of the representer, not the "unity" of the represented, that maketh the person "one", and "unity" cannot otherwise be understood in multitude'. But since each individual, in such a group, is *auctor* of the common *actor*, the words and acts of this *persona repraesentativa* are considered as the words and acts of all individuals, taken singly. If it be an assembly of men, and not a single man, who is authorised as *actor* or *persona*, '*tunc vox partis majoris accipienda est pro voce personae*'; otherwise this *actor* or 'person' would be mute, as is indeed actually the case when the voting is equal.

In this way, and by this delegation of the power of decision to a representative, there arises the artificial personality of *corpora fictitia*, in which '*homo vel coetus unus personam gerit omnium*'. There is no intrinsic difference between the personality of the State and that of other groups, except such as arises from the subjection of the latter to the power of the former. But that one difference is the parent of others. In contrast with the all-embracing representation of his subjects by the Ruler, the representation of the members

of a *systema subordinatum* is in every case limited to *certis rebus a civitate determinatis*. Again, a subordinate group-personality [just as it may be limited in the range of its purposes] may also be limited in its duration; and Hobbes accordingly ascribes a temporary *persona cives omnes repraesentans* to an assembly of popular representatives convoked by a monarch. In the same way, he speaks of a *persona totius familiae* as vested in the *paterfamilias* [for the time being].

In dealing with associations, as in dealing with States, Hobbes draws a clear line of division between monarchical and republican constitutions. The absolutist tendency of his thought leaves no room in associations, any more than it does in the State, for a plurality of organs, with a constitutional division of functions. The *persona Systematis* is therefore, in every case, either *unus homo* or *unus coetus*(57). On one point, however, Hobbes admits a difference between the legal implications of government by a single man, and those of government by a single body of men. The point turns on the effect of acts undertaken by a representative person which go beyond the limits set to his *auctoritas* by the law and the constitution. Any action of a representative person which is *intra limites* is a '*factum uniuscujusque hominis eorum qui Systema constituunt*'; but no man carries any 'person' other than his own if he undertakes action which is *ultra limites*. It follows that the unauthorised action of a single man who represents a system is, in every case, his own action, and his own action only. It cannot be ascribed to the system, and it cannot be ascribed to any of its members. But if the 'person' representing the system be an assembly, a different result is involved. Any action of that assembly which goes beyond the bounds of its competence is also an action of the system itself, as a whole, because the system is identical with the majority [of voters in the assembly]. Not only so, but it is also an action of every individual who co-operated in it, though it is not an action of those who opposed it, or of those who were absent when it was undertaken. Hobbes applies this view particularly to delicts. He regards the delict of a single representative governor of a 'system' as only the delict of a single person, on the ground that no power of representation can give the representative a right to commit unauthorised actions; and he therefore holds that this single person alone is subject to punishment. On the other hand he regards the delict of a representative assembly as being simultaneously a delict of the *totum Systema* and a delict of the individual offenders(58).

Corporal punishment must therefore be inflicted on the individuals who joined in the act; but since individuals only can be punished in that way, the system itself must also undergo, in addition, any punishment of which *coetus capax est.* A *dissolutio Systematis* may therefore be pronounced against a *corpus fictitium*, as a form of capital punishment; or a fine may be levied upon any funds which it may possess.

It is not only to delicts, but also to debts, that Hobbes applies this distinction If an individual who represents a system contracts a loan, only he should incur liability and repay the loan, '*vel ex communi thesauro vel ex pecunia propria*'. He cannot make others liable for his debt; and thus the creditor can only sue the *persona Systematis contrahens* who confronts him visibly as a natural person. If, however, a *coetus* is the borrower, all who have voted for contracting the loan are severally liable, when the creditor is an *extraneus*; but when the debt is owed to a member, *solus coetus ipse*, i.e. *ipsum Systema*, must answer for it. If it cannot answer, because there are no common funds, then the creditor, who is himself a member of the *coetus*, must put the loss down to his own account; for he must have been aware, at the time when he lent the money, even if he voted against its being borrowed or were absent from the voting, that he was also incurring a debt in his capacity of member(59).

It is obvious that these deductions, some of which are not very illuminating, are based upon an extremely individualistic point of view Every form of group-personality is dissolved into representing and represented individuals. Whenever an individual is vested with any right, or charged with any duty, by his own act or by the act of others, *he* is involved with the whole of his personality. Where groups are in question, it is only by the *tour de force* of identifying an assembly with the changing majority of the individuals who compose it that Hobbes is able in some degree to disengage the idea of a corporate 'Subject' of rights and duties from the individual members of the group. With all its imperfections, however, the atomistic and mechanical construction of *Systemata subordinata* which appears in his theory has a historical significance of its own. He was the first to introduce into the theory of Natural Law a conception of Group-persons, which was not simply borrowed from the civilian or Roman-law theory of corporations, but was genuinely deduced from the actual principles of Natural Law; and he was the first to make such a conception the pivot both of public law and of the law of corporations.

II. GROUPS ABOVE THE STATE

When we come to associations which transcend the State, we find the natural-law theory of Sovereignty incompatible with any idea of a *Super-State* [i.e. any idea of an international or federal political system], but compatible with the idea of a *social bond of connection between States* [i.e. the idea of a free partnership].

The medieval idea of a world-monarchy was an idea foreign to the thinkers of the School of Natural Law. They left to the publicists of the Holy Roman Empire the task of continually re-invoking, on reams of paper, the unsubstantial ghost of the old *imperium mundi* (60), but they made the indestructible germ of that dying system of thought yield the new and fruitful idea of *international society*. After the end of the sixteenth century, it became the habit of thinkers to explain the obligatory force of *jus gentium* by a *societas gentium*, in which the original and inextinguishable unity of the human race was supposed to have survived, even though sovereignty had passed to the separate nations (61). It must be admitted that the lack of any clear distinction between partnership and corporation prevented a clear conception of the character of this society of States. On the one hand, a tendency continually reappeared to harden international society into a world-State, and to arm it with the authority of a Super-State organised on Republican lines (62): on the other, the stricter advocates of the theory of sovereignty rejected *in toto* any idea of a natural community uniting all States together (63). But the doctrine which held the field, and determined the future of international law, was a doctrine which steadily clung to the view that there was a natural-law connection between all nations, and that this connection, while it did not issue in any authority exercised by the Whole over its parts, at any rate involved a system of mutual social rights and duties (64). From this point of view international law was conceived as a law binding *inter se* upon States which were still in a state of nature in virtue of their sovereignty, and binding upon them in exactly the same way as the pre-political Law of Nature had been binding upon individuals when they were living in a state of nature. The tendency of contemporary thought, which regarded all positive law as the product of State-legislation,* deprived inter-

* In the view of Gierke, expressed in his work on Althusius (see Appendix II), law is not produced by the State. It is the result of the common conviction of a human community (whether such conviction be manifested directly by usage, or declared by an organ of the community appointed for that purpose) not that there *shall* be, but that there already *are*, necessary limits to freedom. From this point of view positive law is not, in its essence, the product of State-legislation.

national law of any positive character, but gave to it, in exchange, the sanction of pure Natural Law.

If the theory of Natural Law were to remain true to its conception of sovereignty, it could never admit a federal combination of particular States [any more than it could admit a general society of all States] to the position of a Super-State. The conception of the federal State, which was derived by Besold and Hugo, as we have had occasion to notice elsewhere,* from the positive public law of the Holy Roman Empire, could not grow on natural-law soil; indeed we may even say that it has only maintained its existence in modern thought by dint of a constant and bitter struggle with Natural Law. The natural-law theory held rigorously to the principle that it was only the Whole *or* the part [of a federation] which could ever be a State, and that both could not be simultaneously States. A federation must therefore be a case either of a single unitary State with a corporative structure, or of a system of contract between sovereign States resting on the same basis as international law (65). But when the natural-law theorists proceeded to apply this idea—treating Germany as a unitary State, and then placing the United Netherlands, the Swiss Confederation and the Hanseatic League, along with the loosest of confederations, under the same indiscriminate rubric of *foedus* or contract—they found themselves enabled, by the very elasticity and ambiguity of their conception of partnership, to glide insensibly into the use of terms and ideas drawn from the law of corporations (66) † Grotius even goes so far as to draw a distinction of principle between mere contracts of confederation and organised unions of States—distinguishing further, among the latter, between a union of States under a common head and a federation of States which has been transformed, by a *foedus arctissimum*, into a *Systema civitatum* or *Corpus confoederatorum* (67). Whether the inviolability which he vindicates for the sovereignty of the several States (each of which is to remain in itself a *Status perfectus*) can in any way be combined with their inclusion in a union of so corporate a character is a question which is left unanswered.

* Gierke is referring to a section of his fourth volume which is not translated here (§ 12, p. 228).

† I.e starting from the idea that a federation is only a contract or partnership, but then proceeding to obliterate the line between partnership and corporation, they are able to treat a federation of partner States as if it had corporate unity, and were thus itself a State.

III. GROUPS PARALLEL WITH THE STATE

The Church

It was equally impossible for natural-law theory, if its conception of sovereignty were pushed to a logical conclusion, to recognise associations as able to exist *side by side* with the State. If the *potestas summa et absoluta* ascribed to the State was to be a real fact, all other associations must necessarily be contained in the State, and they must necessarily be subject to its power.

But what was to be said, in that case, of the relation of the State to the Church? Here the School of Natural Law had to face the great problem whether the Church was to remain outside its general scheme of ideas, or whether it was to be included, like other bodies, within the limits of that scheme.

From the Catholic point of view, the Church stood outside the domain of Natural Law. The Catholic doctrine of Natural Law, equally with all positive jurisprudence which was coloured by Catholic tendencies, maintained the medieval theory of the two swords;* and it therefore set the Church, as a spiritual State which was independent and complete in itself, over against the secular State. In the natural-law systems of the Dominicans and the Jesuits, the relations between the State and the Church were made to depend entirely on the fundamental distinction which they drew between a human structure created by contract in virtue of Natural Law and a divine and supernatural institution. The Church was regarded as the original and innate 'Subject' of an inherent sovereign authority which, by the dispensation of God, was monarchical in character and universal in scope, and was vested immediately by Him in the person by whom it was exercised at any given moment(68). As the higher of two separate sovereignties, this spiritual authority was superior to the political, and therefore political sovereignty was fundamentally not sovereignty at all. Political sovereignty might indeed seem to be safeguarded by a formula, commonly used by the more moderate curialists after the days of Bellarmine, which makes the primacy of the Church express itself, where it touches the secular sphere, only in the form of *potestas indirecta*; but the safeguard is more apparent than real(69) True some voices were raised, even in the sphere of Catholic doctrine, in opposition to the theory of ecclesiastical supremacy. It was argued that the State possessed a *jus*

* I.e it distinguished the two independent spheres of *spiritualia* and *temporalia*.

divinum analogous to that of the Church, and the idea of the subordination of its authority to that of the Church was accordingly rejected. But even so the Church was always regarded as a separate spiritual State, a *politia* or *societas perfecta*, with a sovereign power co-ordinate with that of the State. There were two separate powers; each of them was independent in its own sphere; and the two were simply connected by mutual alliance (70).

On the Protestant side too, after the early ferment of the Reformation had subsided, the old medieval idea of two *potestates distinctae* continued for some time to survive, and to hold unchallenged sway in theory. There was only one difference. Holding, as they did, that the one universal invisible Church was not a legal institution, and believing, accordingly, that the Church only manifested itself as a legally organised association in the form of a territorial Church, Protestant thinkers were free from any idea that the possession of the two powers could be divided between two separate external authorities (71).

In the Lutheran Church, the view which came more and more to prevail was to the effect that the one divinely appointed authority [the Prince] was called to the exercise of *regimen* in things spiritual as well as temporal, but that he possessed the two powers by different legal titles, and was bound to exercise them according to different laws, through different organs, and subject to different limitations imposed by the rights of the general community. In this view the State and the Church appeared as separate social organisms, with sovereign powers of different origins; only they were united, just as two States may be joined under a system of personal union, by having a common head. This point of view found juristic expression in the episcopal system and the theory of the three Estates* (72).

A more definite breach with the medieval system of canon law was marked by the theory which triumphed in the Reformed Church of Calvin. Based on the congregational principle (*Ge-*

* We may call the Lutheran system one of 'qualified parity'. There is parity, in the sense that Church and State are on a parity as social organisations, with different sovereign authorities corresponding to their different character as organisations, but the parity is qualified, and highly qualified, by the union of the two authorities in one hand. The episcopal system, in which the prince is *summus episcopus*, is a juristic expression of this qualified parity. the system of the three Estates, in which the clergy are a separate Estate, but have to act with the other two in a single State under the supreme authority of the prince, is another juristic expression.

meindeprinzip), Calvinism none the less continued to hold, like Lutheranism and Catholicism, the theory of the double 'polity'; but unlike the Lutherans, the Calvinists vested the united exercise of the two powers not in the Head, but in the whole Body, of the community. They regarded the People as possessing both a temporal and a spiritual sovereignty, which were in some sort co-ordinate with one another, and they made each of the two separate sovereignties issue in a corresponding series of group-organs (73).

We have noticed, in its various phases, the idea of dualism between Church and State. It was impossible for the theory of Natural Law, as it moved onward to its culmination, to assimilate such an idea. On the contrary, it found itself forced, by the sheer necessity of keeping its logical system intact, to press the Church, like other bodies, into the common mould of its theory of the State. The task was the easier because the development of the Protestant system of the State-Church had already provided the theorist with a basis in actual fact. The Church had already been incorporated into the State in practice. It only remained to incorporate it also in theory. Such incorporation of the Church in the State was most readily achieved by those who held the purely 'territorial' view of the Church.* From the beginning of the Reformation this view had always found supporters; and it naturally became an obvious axiom of political theory as soon as thinkers grasped, and pressed to its logical conclusions, the conception of sovereignty which made it the one and only form of social authority This territorial view eliminates not only the conception of a spiritual State, but also any conception of a spiritual authority. For it there is no other

* Gierke uses, in the following argument, a distinction between three forms of ecclesiastical organisation which is common in German thought (1) 'Collegialism' ('formulated', according to the *New English Dictionary*, 'under the name by Pfaff in 1742') is the theory 'that the (or a) visible church is a purely voluntary association (*collegium*) formed by contract, in which the supreme authority rests with the whole body of the members', and that the civil magistrate has no other relations to the church than those which he has to any other association within his territories' (2) 'Episcopalism' is the theory 'which places the supreme authority in the hands of an episcopal or pastoral order. if this authority is in practice exercised by any recognised head of the church, it is only as the delegate of this order as a whole, and with their consent' (3) 'Territorialism' is the theory 'which places the supreme authority in the civil power': its motto is *cujus regio, ejus religio* In England Nonconformity may be said to represent 'collegialism', and Anglicanism a mixture of 'episcopalism' and 'territorialism', with the proportions and the continuance of the mixture both in dispute.

authority, even in ecclesiastical affairs, than the unique and indivisible majesty of the State(74). As an invisible community, the Church is a kingdom by itself. In its external and legal manifestation, it is a State-institution; spiritual office is a particular sort of State-office; and spiritual property is State-property devoted to a particular object* (75). Views of this general character are compatible with very divergent conceptions of the limits to which the authority of the State should be subject in the area of religious life. The territorial system can equally find room both for theories of religious persecution and for theories of liberty of conscience(76). But the issue between persecution and toleration is not a question of the boundary to be drawn between Church and State. It is only a question of the boundary to be drawn between the State and the Individual.

Meanwhile the purely territorial system came into collision with the natural-law doctrine of the contract of society. If such a contract could produce social bodies, why should not a religious association be the product of a 'league and covenant' between believers? The question did not stay long for an answer. As early as the seventeenth century we already find thinkers of the School of Natural Law holding the view which has since been given the name of 'collegialism'. It is a view of the Church as based on a separate ecclesiastical contract of society. It is a view which makes it one of the associations contained in the State.

At first this view can hardly be said to have come into actual conflict with the 'territorial' system On the contrary, it rather served as a foundation and support for territorial ambitions We have to remember that a formula had already been found, applicable to all the associations contained in the State, which made it possible to combine two different ideas—the idea that they derived their existence from a voluntary contract of union, and the idea that they derived their authority from the authority of the State. On this basis, it was easy to assume that there was also a religious contract of union, and that this contract, like other similar contracts, could indeed produce a society, but not an authority. This line of thought may be traced particularly in Grotius' work *De Imperio summarum potestatum circa sacra*(77), which sketches a collegial-territorial system of Natural Law for the Church This

* The reader may find some interest, from this point of view, in Paley's *Moral and Political Philosophy*, Book VI, c x, 'Of Religious Establishment'. E.g to Paley the clergy are 'a class of men set apart by public authority', and maintained 'from revenues assigned by authority of law'.

system, we have to admit, does not altogether square with Grotius' general theory of corporations, as it was described a few pages back. On the contrary, the *De Imperio* shows a far less liberal attitude to the rights of associations, though the writer seeks to conceal his departure from his earlier views by making an artificial distinction between the various species of social authority. In the scheme of ideas which he now propounds, all *regimen* is either *directivum* or *constitutivum*. (1) The first form of *regimen* imposes no sort of obligation: at the most, it either gives advice, *qua suasorium*, or it enunciates some existing obligation, *qua declarativum*. (2) *Regimen constitutivum*, on the other hand, is a real source of obligation; but it can only impose that obligation either *ex consensu* or *ex vi imperii*. (*a*) *Regimen ex consensu* arises from the binding force of contracts. In the first instance, therefore, it can only bind the consenting parties; but secondarily, and indirectly, it may also bind those who are not consenting parties, if and provided that they too are members of the *universitas*, and if the *major pars* of this *universitas* makes a decision which is necessary for its maintenance or improvement Even so, the obligation does not arise from any *superioritas* of the majority, '*sed ex illa naturae lege, quae vult partem omnem, quae pars est, ordinari ad bonum totius*'(78). (*b*) *Regimen ex vi imperii* [as distinct from *regimen ex consensu*] '*obligat ex vi intrinseca supereminentiae suae*'. It is either *supremum* or *supremo inferius*. The latter species may again be subdivided It is either *ex supremo emanans* (in which case it is sometimes only *obligativum*, but sometimes also *coactivum*), or it is *aliunde ortum habens*. But it is only the paterfamilias, and (to a less extent) the guardian and the teacher, who possess an intrinsic *imperium* which is not derived from the sovereignty of the State [i e. which *aliunde ortum habet*]

In accordance with this scheme, Grotius invests the *Ecclesia* (as a *coetus* which is not only permitted, but also instituted, by the law of God) with all natural rights of a *universitas legitima*, including the right to exercise a *regimen constitutivum ex consensu*; but he will not allow it a *regimen imperativum*(79). To the clergy, as distinct from the Church, he refuses to allow even an *imperium constitutivum*: they have merely a faculty of *directio*, such as belongs to a physician(80). All real authority, in ecclesiastical as well as in civil matters, is reserved for the political sovereign; and his *summa potestas* must necessarily, on the principles of Natural Law, and by its very nature as a unique and universal authority, embrace things sacred as well as profane(81). Similar views had been developed by other writers previous to Grotius(82); but it was an almost

contemporary writer, Conring, who expressed most vigorously the general idea that the Church is no separate State, but a corporation contained in the State (83).

Collegialism, however, was destined to become the definite enemy of territorialism, as soon as thinkers began to argue from the doctrine of a contract of society to the existence of an inherent social authority belonging to associations. In that case the authority of the Church, like that of other associations, could be regarded as a corporate authority, subject indeed to political sovereignty, but none the less rooted and grounded in the very fact of ecclesiastical society, and independent in its own area. Gisbert Voet was the first to erect a complete system of natural church-law on this basis (84). He explains the existence of the visible Church as being entirely due to a voluntary contract of union (85). True to the constitutional ideal of the Calvinists, he regards the particular congregation, under its own presbytery, as the primary form of the Church, produced by a covenant made between individual believers; and he proceeds to interpret the larger ecclesiastical groups, organised in an ascending series of different synods, as later formations due to a contract of union (*combinatio, unio, et incorporatio*) between a number of congregations (86). He ascribes to the Church thus constituted a spiritual authority, in regard to doctrine, ritual, and discipline, which proceeds directly from its natural power over its own body (*corpus suum*) (87) He admits that, so far as positive law is concerned, the relation of the Church to the State is determined in a variety of different ways, according as such law varies from State to State (88). He allows, again, that owing to a stress of circumstances due to the Papacy, the true Church has been forced in a number of cases to hand its authority over to the secular government (89). But he holds, none the less, that according to divine and natural law all that the State can properly do is to exert over the Church a supervision which issues from the nature of its political authority, and the Church itself must always retain its own separate spiritual authority (90). He utters a warning against the total surrender of the ecclesiastical commonwealth to the State He protests against the treatment of Church property as the property of the State; and he thus applies in the sphere of the law of property [as well as in regard to doctrine, ritual and discipline] his general idea that the Church is an independent corporation, depending upon itself (91). It is little wonder that his book was instantly stigmatised by the adherents of territorialism as a backsliding into papalism (92).

CHAPTER II

THE PERIOD FROM THE MIDDLE OF THE SEVENTEENTH TO THE BEGINNING OF THE NINETEENTH CENTURY

SECTION I

The Natural-Law Theory of Society during the Period of its Ascendancy

§§16 to 18

CHAPTER II: SECTION I,* §16

THE GENERAL THEORY OF THE GROUP (*VERBANDSTHEORIE*) IN NATURAL LAW

I. *The vogue of Natural Law and its individualistic basis*

After the middle of the seventeenth century the influence of natural-law speculation steadily grew in depth and in extent. The doctrines of the Law of Reason not only acquired an intellectual supremacy over every department of jurisprudence: they also began to translate themselves into fact Advancing irresistibly on their triumphant progress, they only came in sight of the limits of their power at the moment when, in the general European revolution of 1789, they also achieved the realisation of all the high hopes which they had inspired To trace effectively the development, during this period, of the views entertained in regard to the legal nature of Groups, we must henceforth endeavour to follow the history of the natural-law theory of Society not only in its inward growth, but also in its external operation.

We may first of all glance at the general theory of the Group which was held by the School of Natural Law We have already seen that there had arisen, on the soil of the doctrine of Social Contract, a general theory of society which included the State and all other human groups in its scope, and interpreted them all in the light of a single principle. This general theory of all forms of *societas* was now expounded in detail, and it became the more influential as thinkers occupied themselves more with attempting to elaborate Natural Law into a regular system of doctrine—an ambition which was nowhere pursued more ardently than in Germany. Even when no such attempt was made—when thinkers confined their attention to the State, or when [though dealing also with other groups] they assigned to the State alone an inherent right of existence—it was still their regular habit to raise the fundamental issues of principle in which the problem of Group-life as a whole was involved The very rebel who followed a line antagonistic

* Gierke gives at this point, in the German original, a list of the works to which reference is repeatedly made in this section For this list, see below, pp. 409–417.

to Natural Law was forced to define his position in reference to the general axioms of this dominant social theory.

The development of the general natural-law theory of Groups proceeded along many divergent lines, and it was attended by lively differences of opinion. But the guiding thread of all speculation in the area of Natural Law was always, from first to last, individualism—an individualism steadily carried to its logical conclusions Every attempt to oppose this tendency was necessarily a revolt, on this point or on that, against the idea of Natural Law itself Many of these attempts meant nothing more than an obstinate adhesion to the crumbling intellectual system of the past; some of them contained the germs of a future philosophy; but none of them, at the moment, possessed either the lucidity, or the vigour, which would enable it to withstand the progress of the general individualistic tendency.

II. *The priority of the individual to the community, and the consequent views of law and property*

The fixed first principle of the natural-law theory of society continued to be the priority of the Individual to the Group—a priority all the more readily assumed because the state of society was universally held to be derived from a previous state of nature, in which it was supposed that no real group had existed.

According to the view which more and more held the field, the individual in the state of nature had been his own sovereign. Men were originally free and equal, and therefore independent and isolated in their relation to one another. But how could this assumption be reconciled with the postulate, which lay at the root of the whole of Natural Law, that a valid law already existed in this self-same state of nature? Was it possible to conceive a system of law as having authority, unless it limited individual wills? And could individuals be limited and bound by a common law, unless they were at the same time united in a community?

The solution of this problem was a matter of decisive importance, not only for its bearing on men's conceptions of the primitive condition of humanity, but also for its effects on their interpretation of the contemporary world. The view was becoming more and more prevalent that, after the foundation of civil society, the authorities vested with the possession of sovereignty still continued to remain, in their sovereign capacity, in the same state of nature in which sovereign individuals were supposed to have been before.

The first conclusion drawn from this view was that sovereign States were to be regarded, in their relations to one another, as 'moral persons'* still remaining in a state of nature, and therefore subject to the continuing validity of the pure Law of Nature, which thus became a system of international law(1). In this way the question originally raised in regard to the state of nature—'How could a system of law be possible among completely free and equal individuals?' recurred again as a fundamental question of international law. Nor was this all. There was also the question of the relations of the political sovereign to his subjects. Remaining as he did in the freedom of the state of nature, he was held to be unrestrained by any limits of positive law; but he was also held to be obliged by the Law of Nature(2) We can see how the profoundest issues of public law [internal as well as international] depended on the possibility of reconciling sovereignty with legal obligation.

All difficulties disappeared if once thinkers consented, with Hobbes and Spinoza, to explain away Natural Law into the natural rule of the power of the stronger over the weaker, and to regard the state of nature as a war of all against all(3). A natural law of that order erected no barriers against the play of will, and founded no community. But such Natural Law was no law at all. it only sailed under the name of law like a ship under false colours, to conceal the bare piratical idea of power. If he were subject to no other law than a Natural Law of this description, the sovereign Ruler of actual contemporary life (equally with the sovereign individual of the primitive state of nature) was really released from any legal obligation at all. Public law disappeared, so far as his relations to his subjects were concerned · international law equally disappeared, so far as concerned the mutual relations of States(4). Unless the theory of Natural Law was willing to lay the axe to the roots of its own existence, it was precluded from following the line that Hobbes and Spinoza indicated(5).

It is not surprising, therefore, to find that the prevalent doctrine in the School of Natural Law insisted firmly on the genuine *legal* character of such law, and regarded its binding obligation as coeval with the state of nature. The followers of this doctrine would

* Moral person (*persona moralis, personne morale*) simply means a non-physical person—a person such as exists in the world of men's thoughts (and particularly in the world of their legal thought), but not in the world of physical nature No ethical connotation is involved, but it is the danger of the term that an ethical connotation may be imported. Rousseau's theory, that the general will of the moral person of the community is always right, does not escape this danger.

not even consent to turn an ear to the teaching of Thomasius, who held that the Law of Nature had only a power of inward obligation, and thus turned it into a mere moral imperative (6). They always insisted that the Law of Nature had the full power of external obligation (7). But they began to diverge, and to diverge very widely, when they tried to find a way of explaining the existence of this external obligation without sacrificing at the same time their belief in natural liberty The simplest way of producing an external control* which was compatible with the full sovereignty of the earthly Ruler was to find it in God Himself. Now it is true that there was lively controversy about the relation of *jus naturale* to God, and whether its origin was to be ascribed to His Will or His Being;† but any appeal to Divine authority was not a matter of such practical moment in connection with *jus naturale* as it was in connection with another issue—that of the importance to be assigned, and the scope to be given, to the *jus divinum* derived from immediate divine revelation.‡ Even if the Divine Will was considered to be the ultimate source of Natural Law, and God was held to be the legislator who formally enacted it, the Reason of man was still regarded as the only source from which knowledge of this law could be actually gained, by way of a natural or rational revelation running parallel to the process of religious revelation proper (8).

* Natural Law, it was argued, is binding not only *in foro conscientiae*, but also *in foro externo* It is an external control, which has the power of imposing external obligation. But how can there be an external control which is really compatible with the natural liberty of the Ruler, who remains in the state of nature? One answer, here discussed, is to the effect that the external control of Natural Law is really an external control imposed by God, whose law is always above our liberty

† The controversy is the same as that waged between the mediæval Realists, who held that Natural Law was the dictate of Reason, grounded on the Being of God, and the mediæval Nominalists, who held that it was simply the command of God, founded upon his Will Cf *Political Theories in the Middle Age*, pp. 172–4.

‡ We may remember in this connection St Thomas' distinction of the various '*leges*'—the *lex aeterna* by which God Himself acts the *lex naturalis*, which is the detection by human reason of His eternal plan the *lex divina*, which is the law He has directly revealed to men in the Scriptures, and the *lex humana*, or positive law of human societies The controversy about the extent to which *lex divina*, or Scriptural law, was an external rule that imposed itself on the State was a controversy of more practical importance (Gierke suggests), in the period after the Reformation, than the more academic controversy about *jus naturale* and its origin in the Being or Will of God The one touched statesmen and clergy, we may say the other only affected the professors of Natural Law in the Universities.

The idea of a transcendental source of natural-law obligation receded still further into the background if the Law of Nature was ascribed not to the Will of God, but to his Being, or if, again, He was only invoked as the author of the Reason which itself determined the rules of such law(9). Much the same may be said of another assumption, which was made by a number of thinkers—that Natural Law had an external sanction in the Divine threat of penalties for its breach; for here again all that was meant was [not a direct intervention of God, but only an inevitable] retribution which manifested itself in the natural course of affairs(10).

We thus see that the appeal to Divine authority in order to secure a legal validity for the Law of Nature resulted in little more than the provision of a formal basis for it; and those who never introduced the name of God at all were able to secure the same result almost equally well [by contenting themselves with human reason as the formal basis of Natural Law](11). If, therefore, the power of the Law of Nature to impose obligation *in foro externo* was not to remain a mere phrase, it had to approve itself as an actual fact in the current relations between man and man [apart from any Divine intervention].* This was the line actually taken in the prevalent theory. All living beings who came into contact in the state of nature were supposed to have a claim upon one another to the observance of Natural Law; and the claim was held to be guaranteed by a power of using coercive measures, which, under the conditions of the state of nature, must necessarily take the form of self-help. According to this view each individual, in the original condition of humanity, had been the guardian and enforcer of Natural Law as against every other individual(12). This view was extended to cover the relations of State to State under international law; it was even extended to cover, in some degree, the relations of subject to sovereign under public law In both cases [that of State *versus* State, and that of subject *versus* sovereign] there was supposed to be a right, which could be enforced by the method of self-help, to the due observance of the limits imposed by the Law of Nature(13). Two results followed, or seemed to follow, from this general view. On the one hand, it appeared as if Natural Law possessed that quality of being enforceable, in

* Since God was not really regarded by the thinkers of the School of Natural Law as giving that law the power of binding *in foro externo*, it must be shown that Natural Law carried in itself such a power, which could be seen at work in the relations of man to man, apart from God, or from any intervention by Him.

which, from the days of Thomasius onwards, the distinction of law from morality had been more and more made to consist; and on this, in turn, it appeared to follow that it carried in itself a full power of imposing obligation(14) On the other hand, so long as any idea of external enforcement by a superimposed authority continued to be excluded, the nature of the legal obligation imposed by Natural Law seemed compatible with the notion of a sovereign and absolute liberty.

But the question at once arose whether it did not necessarily follow, if natural legal obligation were once admitted to be a primordial fact, that you had already, in that very assumption, introduced the fact of *community* into the regime of the state of nature. It was difficult to answer the question with a simple negative. It is true that the prevalent doctrine in the School of Natural Law made law the source of community, and not community the source of law(15). But even if that were admitted, the question might still be asked whether a system of law could exist, even for a single moment, without giving effect to the community-creating power which was inherent in its nature. And yet the whole natural-law body of thought was based on the opposite assumption —the assumption that *status naturalis* was the very antithesis of *status socialis*.

A favourite method of escaping from this dilemma was found in the conception of *socialitas* which had been propounded by Grotius. The advocates of the principle of 'sociability' held that the Law of Nature commanded sociable behaviour, and they therefore believed that the state of nature, if it were not yet a state of society, was at any rate a state of sociability(16). They represented this state as a state of common intercourse, but intercourse so formless, and so insecure, that the conception of a *societas* was entirely inapplicable to it(17). Yet it contained already, from the very first, the germ of society; and the antithesis between the natural and the civil condition thus lost its edge. The transition to civil society no longer appeared as a break-away from Natural Law, but rather as a further development and strengthening of its principles. Two consequences ensued. In the first place it became possible to hold the theory that all positive law either was, or at any rate should be, informed by Natural Law*(18). In the second place,

* This followed upon the idea that civil society, and therefore the positive law belonging to it, were developments and corroborations of an original sociability and the original natural law belonging thereto.

a basis was provided for a school of legal thinkers (such as we find more particularly in Germany), who, starting from the idea that the creation of society was a stage in the evolution of Natural Law itself, proceeded to add to 'pure Natural Law' —which they interpreted as strictly as ever in an individualistic sense—a separate and subsequent body of 'social natural law'* (19).

It is obvious that all such attempts to find a half-way house involved no real surrender of the idea that individual isolation was prior to social cohesion. But the strict individualistic school would not accept even the appearance of a concession to the idea of community which was involved in these attempts. Under the influence of the philosophy of Hobbes, the view continued to be urged that the state of nature did not contain even the germ of community; that the formation of society was a 'break-away', dictated by reason, from the natural order of human relations; in a word, that society began in an act of artificial institution, and as a conscious departure from nature (20). In England, the influence of Locke secured an increasing acceptance for the theory that the original condition of man was unsocial—an acceptance due to the fact that he used it to support the rights of individuals to liberty of action (21). On the Continent, Rousseau's theory spread like wildfire. In that theory the state of nature, as a state in which the liberty and equality of men were still unlimited by any social fetters, was elevated to the splendour of a lost paradise.† Community was regarded as a necessary evil; and all social institutions were allowed a right of existence only in so far as they were directed to the restoration of the liberty and equality of the state of nature, which the world had suffered so much by losing (22). In Germany also, similar views were widely disseminated during the second half of the eighteenth century (23). They attained their theoretical zenith in the early teaching of Fichte, who derived the

* On this basis we get (1) the pure state of nature, with its pure natural law; (2) the state of non-political society (which develops from the state of nature under the impulse of natural law), with its social natural law, and (3) the state of political society, with its system of positive law.

† Gierke's account of Rousseau has to be modified, partly by a distinction between the theory of his *Discours* of 1753 and that of his *Contrat Social* of 1762, partly (and consequently) by a recognition of the superiority which, in the latter, he assigns to the civil State in comparison with the state of nature. See Bosanquet, *Philosophical Theory of the State*, and Vaughan, *The Political Writings of Rousseau*.

whole system of law from the conception of the Ego and its absolute liberty (24).

In Fichte's view the 'relation of Right' (*Rechtsverhaltniss*) arises among human beings when the Ego, in the process of becoming self-conscious, has passed beyond the stage in which it places itself in the world of sense as the sole original cause and demands for itself unfettered activity and an absolute power of coercing others. It now proceeds, in the light of its own self-consciousness, to take for granted the existence of other reasonable beings outside itself; it ascribes freedom to them as well as to itself; and it finds that it must, as the price of remaining self-consistent, and in order not to contradict either its own liberty or the liberty of others (which it has deduced from its own), proceed to limit its liberty by the idea of the liberty of all other persons (25). On this basis 'original Right' (*Urrecht*) is co-extensive with the sovereignty of the Ego (26); and natural 'Law' (*Gesetz*) is not obligatory, but only permissive, in the sense that it offers advice in regard to the action which the Ego should properly take *if* it would correspond to its own notion (27). It depends on the free decision of individuals whether they will follow this 'problematical' (i.e. conditional) rule: whether they will found a 'community', by declaring self-imposed limits and agreeing to their observance; whether, finally, for the purpose of guaranteeing these limits, they will institute a coercive law which operates mechanically (28). But just because he thus starts from the omnipotence of the Individual, Fichte is unable to regard Natural Law as law in the proper sense. It is only the power of the State, he argues, which gives reality to the rule of law. Conversely, he adds, it is only the law of Reason which the State can confirm as real law. 'The State becomes man's state of nature; and its laws should be no other than the realised law of nature' (29).

Kant is equally unable to transcend the limits of an individualistic point of view. [There are, it is true, some higher elements in his thought.] He bases law, along with morality, on the 'categorical imperative', which is an *a priori* datum involved in the law of thought (30): he believes in an *a priori* existence of the idea of the civil or social state, which is as early as the state of nature itself (31): he assumes an enforceable legal obligation to enter into membership of a legal community (32). But [his fundamental basis is individualism] he makes the autonomous individual prior—in idea, if not in time—to any form of community (33); and he regards contract as the only legal method of producing a legal nexus

between human beings(34). If, like Fichte, he attributes no more than a provisional validity to the pre-political Law of Nature, he also, like Fichte, holds that the State, as an organisation intended for the purpose of giving a peremptory form to law, is bound to accept and confirm the substance of a pre-existent law of Reason; and he believes that the norm or standard of this law of Reason must still continue to be the inherent and inalienable claim of the rational individual being—regarded as an end in himself—to enjoy liberty, equality, and independence(35).

This belief that the primitive system of legal relations need not be associated with the existence of any community was also reflected in the development of theories regarding the origin of *property*. Thinkers still retained the traditional assumption of an original community of possessions; but while the Middle Ages had believed that this *communio primaeva* had issued in a positive system of joint-property, the School of Natural Law interpreted it as being only a *communio negativa*, similar to the present system of common enjoyment of air and sea, and signifying, therefore, not so much community of property as the entire negation of property(36). This idea of a 'negative community' of property in the state of nature was one which could be, and was, increasingly turned to account for the purpose of justifying, as consonant with Natural Law, the limits imposed upon private property in the civil state*(37). But unlike positive community of property, from the division of which a system of severalty must necessarily emerge, mere negative community could never be represented as the origin of private property(38) On the contrary it tended to give free scope to the development of theories which derived private property (like all other rights) from the primitive right of the Individual. Following this line of thought, Locke argued (and his argument was a landmark in the history of thought) that property already existed, in the pre-social state, as the result of individual labour or occupation; and he was thus able to reckon it, along with liberty, as one of the natural-law rights which civil society found already existing when it appeared on the scene, and which it could not touch or modify(39) From the days of Locke onwards the theory of the pre-social origin of property found an increasingly

* E g. to take an example which Gierke cites from Pufendorf in his note, the right of the State to unclaimed property, and its *dominium eminens* over all property, might be regarded as derived from, and as relics of, the original 'negative community'.

large measure of support(40). On the one hand, it received the homage of Rousseau himself(41); on the other, Justus Moser made it the basis of his conservative theory of history and society(42). With some reservations, it was adopted also by Kant(43). But an older theory, which supposed property to have been created for the first time by the emergence of political authority, still survived. Not only was it still upheld by the opponents of natural-law individualism(44). it was even advocated by some of the exponents of that system of thought, who attempted to give it a new basis by arguing that the real source of private property was a 'contract of property', which they held to be included in the general 'contract of society'(45). Fichte in particular, arguing upon this basis, arrived at a system of economics which may almost be called socialistic*(46).

Though the priority of the Individual to the Community was thus emphasised with an ever increasing intensity, there were never wanting representatives of an opposite view, which started from the assumption of *primitive community* This view, however, generally took the form of a theological reaction against the secular theory of Natural Law; and all the attempts of theologians to derive civil society from the original communion of man with God, or from a primitive community of men which had been established by God, were inevitably driven from the field by the victorious advance of individualistic theory(47). This was the more inevitable because the advocates of such views could not even preserve their own loyalty to their principles. As they developed their theory of society, they deserted their own side, and went over to the view that the community was derived from the individual(48). Leibniz himself, although he started in principle from the idea of the Whole, failed to escape from this temptation(49). The first attempts at an historical conception of social evolution led to vigorous attacks on many of the fictions of the Natural-Law School; but in their immediate results such attempts were even less effective [than the arguments of the theologians] in destroying the foundations of individualism. Montesquieu never transcends the idea of society as the product of intelligent individuals(50). Justus Moser attacks the revolutionary demands of the law of Reason; but in his own theory he derives civil society from a contractual union between independent landed properties, and from the subsequent contracts

* On Fichte's economics see W. Wallace, *Lectures and Essays* (Part II, no. VIII), 'the relations of Fichte and Hegel to Socialism'.

made with fresh individual entrants(51). Vico and Ferguson, too, never really break with the idea of a non-social primitive condition(52) Herder was the first to declare that the 'state of society' was man's 'state of nature'; but even Herder limits this natural society to 'Family organisations'. Nature has ended her work with them; and when it is necessary to go still further, reason and need now lead men on, and freedom takes its beginning(53).

It was a matter of no little importance that the idea of the simultaneous origin of the community and the individual was never entirely extinguished. But, at any rate for the time being, the broad and sweeping current of individualistic ideas was not stemmed in its course by that survival.

III. *The natural-law view of the source of Group-authority*

From the premiss that the individual was prior to the community the prevalent theory of this period immediately proceeded to draw the conclusion that the community derived its origin from the individual. If that premiss were really held—if, in other words, the state of nature was really conceived to be a non-social state—it was impossible to avoid this conclusion, unless the idea of *supernatural co-operation* were introduced into the process of social evolution. Attempts were constantly made to use the idea of divine intervention in order to refute the theory that social authority was derived from individual sovereignty. Among the adherents of the doctrine of the original sovereignty of the People, for example, we find something of a tendency to develop the view —which had been originated by Suarez and Molina—that while the *existence* of civil society may be allowed to be the work of individuals, the *power* of the associated community over its members proceeds from God(54). From another point of view [which may be traced in Bossuet and Fénelon] the community itself, as a simple fact of social union, is held to possess no sovereignty, and sovereignty is represented as arising only when a divine commission is directly given to the Ruler—so that the final constitution of political society [as including both a community and a sovereign] is based on an act of divine institution(55). Horn developed these theocratic ideas still further, and with a more rigorous logic. Basing himself on the premiss that individuals alone existed in human life, he entirely denied the possibility of producing a social Whole by any human means, and he therefore derived social authority from

an act of divine intervention, by which one individual was elevated above the rest, and equipped with sovereign omnipotence (56).

If, on the other hand, the existence of an *original community* was made the basis of argument, it is easy to see how political authority, like all other forms of Group-authority, could be conceived as the continuation of a naturally given social authority [inherent in the original and naturally given community], which limited the individual from the very first, and could only be reformed or transformed [but never eliminated] by the claims of human liberty. Some sort of advocacy of this view, more or less clearly expressed, was never entirely absent (57).

But the dominant tendency of the age was neither favourable to theocratic ideas, nor ripe for historical explanations in terms of organic continuity More and more widespread, therefore, was the triumph of the idea, inseparable in its nature from the theory of a social contract, that a previous sovereignty of the individual was the ultimate and only source of Group-authority. This was a point on which natural-law doctrines of the most divergent kinds were all unanimously agreed. For all of them alike, political authority was the product of a fusion of so many original individual authorities, whether the fusion was regarded as total, or as limited to certain points. For all of them, therefore, the community was only an aggregate—a mere union, whether close or loose—of the wills and the powers of individual persons. This was the basis on which Hobbes and Spinoza erected their thoroughgoing theories of absolutism (58): it was also the basis on which Althusius and the Monarchomachi, like Locke and Sidney afterwards, erected their theories of popular sovereignty (59) it was equally the basis of the theories which attempted to steer a course more or less midway between absolutism and popular sovereignty—the theories we find in Grotius, Huber and Pufendorf, and their disciples, and among all the most influential of the German systematisers of Natural Law (60). Rousseau argued, with all the force of his fiery eloquence, for the derivation of political authority from the individual (61). He tried hard to refute, by the aid of new reasons, an old argument often alleged against this theory—the argument that the right of life and death enjoyed by the State could not possibly have arisen from a devolution of individual rights, because the individual himself enjoyed no right of self-murder (62); while Beccaria, taking an opposite line, was bold enough to use that argument in support of the first attack delivered on the principle of capital punish-

ment* (63). Towards the end of the eighteenth century it had almost become an undisputed axiom that the origin of all social authority was to be found in the contributions of power and of will which had been made for that purpose by free and equal individuals (64). It is significant that two thinkers of such different tendencies as Moser and Sieyès could agree in identifying the original creation of society with the constitution of a business partnership† (65). Fichte, too, until the days of his conversion [to a belief in the Group and in Group-authority] was a rigorous upholder of the individualistic basis (66); and Kant also never escaped from the idea that the whole of the right of civil society over its members was only the sum of the rights transferred to it by individuals (67)

(IV.) *Natural Law and the idea of contract as explaining the origin of Groups*

If this were the case, it followed automatically that the only legal method of bringing a community into existence was the free act of individual wills How could there be any valid machinery, except that of free agreement, by which the inherent sovereignty of the individual could be abolished, or even transferred? It was this process of thought which turned the hypothesis of an original social contract into an accepted dogma of Natural Law. The theory of Contract assumed various forms, but there was a general agreement among its advocates that the basis of civil society was a legal transaction, by which previously free and equal individuals had alienated their right of self-sovereignty in favour of a group which they had themselves created. The prevalent theory in the School of Natural Law continued to represent the transition from the state of nature to the social state in two stages. In the first, a contract of union had substituted social cohesion for individual isolation. In the second, a contract of subjection had abolished the previous equality of all, and constituted a Ruler (68). No great change was made in this theory when Pufendorf intercalated the

* Molina deals with the point raised by Beccaria, and provides an answer; see note 60 to § 14.

† Contrast the famous passage in Burke's *Reflections*—'the State ought not to be considered nothing better than a partnership agreement, in a trade of pepper and calico, coffee or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the p rties'.

act of making a constitution between the two contracts(69), or when other writers, again, proceeded to transform this act into a formal constitutional contract*(70). The extremer forms of the theory, which assumed a single original contract, and made the State spring, directly and ready-made, from one act of agreement between all its members, had only the effect of attaching still greater importance to the immediate action of individual will. On the one hand, Hobbes and Spinoza, assuming a single contract of *subjection,* ascribe its conclusion to the deliberate act of all individuals(71); on the other, Rousseau, proclaiming the theory of a single contract of *society,* makes it entirely unnecessary for the community, which has already achieved its unity in and by that contract, to undertake any further action for the completion of the civil State(72).

Important differences between the various theories of contract were created by different conceptions of the *motive-forces* which were supposed to have determined men to surrender their natural freedom. [But these motive-forces were never regarded as primary factors.] So long as the root-idea of contract was maintained, any force (however powerful it might be, and whether it were regarded as internal or external), which impelled men to create a society, could only appear as one of the remoter causes of the civil state; and the legal basis of that state was still made to reside exclusively in a deliberate agreement of wills Thinkers who believed in an internal force might recognise a social instinct as innate in man, and seek to ascribe the final cause of the State to God or Nature; but they still made its legal existence depend upon free consent(73) Those who believed in an external force might regard man as naturally an anti-social being, who could only be compelled to enter a community by the pressure of external necessity; but they held, none the less, that the community only acquired a power of obliging its members when there had been a decision of individual wills to that effect, and they sought accordingly to represent the making of the contract as an act which, in spite of the compulsion of circumstances, was itself juristically free(74). The same was true of the views which attempted to reconcile these two alternatives(75). It was also true even of Kant. He believed, indeed, in the existence of a duty to enter a legal community, arising from the rational

* This involved three contracts—the contract of society (*Gesellschaftsvertrag*); the constitutional contract (*Verfassungsvertrag*), and the contract of government made thereunder with the Ruler (*Herrschaftsvertrag*).

imperative, 'that the state of nature should be transformed into the civil state': he even allowed the use of compulsion by each against each with a view to enforcing this duty; but he held, all the same, that the formal consent of all individuals was the indispensable juristic method by which the foundation of civil society must necessarily be set in motion(76). The general tendency of thinkers was towards unqualified voluntarism Regarding the institution of the social state as a free act of human will, they distinguished it more and more from the motive-forces which lay behind it(77), and they imported into it, more and more, the element of conscious calculation(78).

If we turn to consider the *efficacy* of the original contracts we find, once more, an absence of general agreement. In two directions we find the efficacy of contract depreciated. Those who regarded contract as explaining the existence of the State, but as incapable of explaining its authority, refused to admit that the force of individuals was adequate by itself to produce a completely equipped community(79) Those who continued to attach importance to the idea that a community was an original [and naturally given] fact sought to whittle down the creative force of an act of contract until it became a mere power of modifying [the original and natural community](80). But such moderate views were increasingly forced to give way to the more rigorous doctrine which made the original generation of the community depend wholly and entirely upon contract(81).

The majority of the natural-law theorists regarded the original contracts which they postulated as *historical facts*, of which, by the mere play of accident, no historical evidence had been preserved. The most they were willing to allow was that sometimes primitive man, instead of making a definite contract, might have made tacit agreements of union(82). They also admitted the possibility of societies which had been, in the first instance, founded and held together by force; but they held that such societies only attained stability through the subsequent assent of their members, either tacit or express(83). But side by side with these views another began to make itself felt, which Kant was the first to express in clear terms. According to this view, the political contract had not the historical reality of 'fact': it had only the practical reality of 'an idea of reason'.* It was an *a priori* idea in the light of which

* In other words, Kant holds that contract is not the chronological antecedent, but the logical presupposition, of the State. The thinker who wishes to

alone the State could be understood, and by which alone 'its legal justification could be conceived' (84). The distinction drawn by Kant disentangled the problem of the historical origin of the State from the natural-law fiction [of its origin in a contract]; but it only did so at the cost of entangling the problem of the philosophical explanation of the State's legal basis (and entangling it more deeply than ever) in the meshes of individualistic fictions.

When we turn to consider the question of the *continuation* [i.e. the continuing validity] of the original contracts, we find the progress of individualistic views once more reflected in the development of natural-law theories. The demand for original unanimity [in the first formation of the State] began to be pressed more rigorously. An increasing emphasis was laid on the necessity of explaining all majority-decisions by an original unanimous agreement that they should be valid (85), until finally it came to be doubted whether such decisions had any obligatory quality at all (86). [The progress of individualistic views, which appears in such insistence on individual unanimity in the *first* formation of the State, was also reflected in the development of natural-law theory in regard to the *subsequent* validity of the original contract.] At first, thinkers had been content with the idea that later generations were bound by the contracts of their predecessors, but the fiction of fresh contracts [renewing the original contract in each generation] soon came to be regarded as necessary in order to explain the social obligation of each new age (87) At last a point was reached when the individual was not only assured freedom of entry into the State [by being made a party to a fresh contract when he reached maturity], but also freedom of exit; and each group of individuals was thus given the right of creating a separate autonomous society (88). Here the theory of contract had touched an extreme where, by denying to the will of yesterday any authority over the will of to-day, it condemned itself to suicide.

It was in connection with the State that the theory of contract had been developed. But it came more and more to be applied to all human associations, so far as they could not be regarded as merely creations of the State itself (89); and thus the existence of the Church, like that of local communities and corporate bodies, was ascribed to a special contract of society made for that pur-

understand the State must regard it 'as if' it had been formed by contract: the statesman who wishes to guide it properly must regard his position 'as if' it had been derived from contract.

pose(90). Only in the sphere of Family-life, and only in the shape of the household community, was it possible still to trace a survival of naturally developed and necessarily binding obligation(91). But even in the sphere of the Family itself the admission that there could be a society which was independent of the will of its members was finally limited to the relation between parents and children under age. When once the age of majority had been attained, a contract of partnership was held to be necessary; and the full logic of the conception was particularly, and increasingly, applied to the institution of marriage(92).

Opposition to the doctrine of contract was never entirely absent; but it was partly based on theocratic assumptions, which had now lost their vitality(93). There was little profit to be gained from Horn's penetrating criticism of the theories of contract(94), when the critic himself, caught in the toils of a crude individualism, at one moment refused to allow any source of a genuine political authority other than a direct commission of divine 'majesty' to an earthly lieutenant(95), and then at the next, when he dealt with republics, was ready to make a mere contract between individuals the basis of something which in every way resembled a genuine political authority(96) The doctrine of contract was more seriously threatened by the continued existence of the older theory of the natural origin of the State(97). But it was only by slow degrees that a fresh philosophical outlook and a broader historical knowledge were applied to this theory(98); and meanwhile the very leaders of the movement which was to produce an organic conception of historical evolution contented themselves with modifications of the theory of contract, and never attempted to reject it entirely(99). In much the same way, the opposition which was offered to the contractual theory by those who attempted a more realistic treatment of the State was in its beginnings no more than tentative(100). Hume himself, vigorously as he argued against the idea that actual political obligation depended on a legal basis of contract, none the less retained a belief in the existence of an original contract(101).

V. *The natural-law view of the purposes of Society and its various Groups*

If all forms of common life were the creation of individuals, they could only be regarded as *means to individual objects*; for how could individuals ever have come to such a pass, as to sacrifice their

natural liberty and equality to an object that lay outside or above themselves?

The view we should thus expect was that which was actually held by the theorists of the Natural-Law School. They agreed in holding an individualistic theory of all social purposes, and, in particular, they always regarded the end of the State (differently as they might define it) as consisting in the attainment of some good which the individual sought to attain for himself, but could not actually attain so long as he lived in isolation(102). They were equally agreed in believing that the end of any community also limited its *sphere of authority*, and, in particular, that the end of the State limited the extent of political authority; for it had to be assumed, on their principles, that in every contract of partnership each individual transferred to the partnership only such rights as the end of the partnership necessarily involved(103). If, in spite of this large measure of agreement, they differed widely from one another when they came to determine the actual *relation between Society and the Individual*, the difference was due not only, or so much, to any difference of views about the end of society, as to a divergence of opinion about the amount of the authority which was indispensable to the attainment of that end.

So far as any theories were developed, on the basis of the doctrine of contract, which were favourable to *the complete absorption of the individual in society*, they rested on the assumption that there was no other way for the individual to attain the enjoyment of the end of his life than by an absolute legal surrender of himself. But it was only Hobbes who pushed this paradox, which he had himself invented, to its extreme limits; and even he made some reservations in favour of the individual(104). Spinoza, using the same basis as Hobbes, drew very different conclusions, seeking to build upon it a theory which made the spiritual and moral liberty of the individual the final end and controlling limit of the State's authority(105) Rousseau starts, like Hobbes and Spinoza, from the idea that the surrender of all individual rights to the community is the only logically conceivable, and the only legally valid, means of achieving an individualistic purpose, which consists, on his view, in restoring the lost liberty and equality of all(106); but though he starts from the idea of surrender he succeeds in ending his argument, by dint of a series of sophisms, in a conclusion which seems to guarantee the indestructible rights of man(107).

But the prevalent doctrine of Natural Law assumed, as a matter

of course, that the individual surrendered *only a part of his original rights* into the common stock of society; and the advocates of that doctrine increasingly made it their chief endeavour to provide the individual with a guarantee against the abuse, or even the extension, of the social authority which he had called into being. More and more emphasis was laid on the fact that the purpose of all social institutions was limited to the development of individual persons. Even the thinkers who still maintained that the purpose of the State had a general or public character proceeded without hesitation, after elevating the idea of *salus publica* to the position of the supreme standard of political life, to identify it with the mere fact of the prosperity or happiness of individuals(108). But the victory lay more and more with a trend of thought which definitely refused to acknowledge that Society had other than limited purposes, or that the State itself had any but particular and strictly defined objects With the purpose of the State thus confined to the provision of external and internal security, or to the realisation of a scheme of legal order(109), the sovereign commonwealth was reduced, in the last analysis, to the level of an insurance society for securing the liberty and the property of individuals(110)

At the same time, and in close connection with this trend of thought, the theory of the Rights of Man grew into a great and spreading tree The supposition that individuals, on their entry into civil society, were only willing to surrender the smallest possible part of their freedom, was now associated with the doctrine that certain of the original rights of the individual were inalienable and intransferable, and could not, therefore, be effectively surrendered, even by an express act of contract(111). In this way a distinction came to be drawn between inherent and acquired rights. Acquired rights, it was argued, were subject to the system of positive law, which depended for its existence on the State; but inherent rights were based on the pre-social Law of Nature, and since that law was still valid to protect them, they were immune from any invasion by legislative action(112). The theory of rights of man which were thus inviolable by the State itself was used by Thomasius and his successors in the struggle for freedom of conscience(113). It was developed by Locke and the political economists in the interest of economic liberty(114). It was expounded by Wolff in the academic form of a doctrinaire theory(115), and erected by later thinkers into a definite and rigid system(116). Finally it became,

after the French Revolution, the essential core of the whole of the doctrine of Natural Law(117). In the heart of social life itself the individual had now a sphere reserved for him which was itself immune from society; and this Sovereignty of the Individual was obviously more original, and more sacrosanct, than any possible Sovereignty of Society, which could only be derived from *him*, and could only serve *him* as a means.

But it must be admitted that individualism was always liable to transform itself into social absolutism, just as social absolutism was equally liable to transform itself into individualism(118). These imagined contracts could be made to include whatever was needed to suit the practical tendencies of the age. An individualistic basis of thought did not prove itself then, any more than it does now, an effective barrier against socialistic or communistic aspirations(119).

Only occasionally does there ever appear, during the period of which we are treating, any inkling of what we may call the higher view. This is a view which makes both Society and the Individual contain in themselves their own end and object, so that neither can ever sink into being a mere means to the other, though either is meant for the other. It is a view which regards the juridical organisation of a community as ceasing to be true to its own 'Idea', unless it assigns equally original, and equally sacrosanct, spheres to the commonwealth as a whole and each individual member, and attunes their several spheres in concord and harmony(120).

VI. *The natural-law view of the Being of Groups*

We may now turn, in conclusion, to enquire into the natural-law conception of the Being, or essential nature, of Groups; and here we can really see how a logical individualism is inevitably impelled to annihilate any idea of the independent existence of the group If civil society in general was merely the result of a contractual act, whereby individual rights were pooled in order that individual objects might henceforth be socially pursued, such society must, in the last analysis, resolve itself into an aggregate of mere legal connections between individuals. No group could be anything more, upon this basis, than a simple nexus. This legal nexus might be depicted as loose or intimate, simple or complicated, temporary or permanent; but however it might be depicted, it was constituted by the same elements of thought which were to

be found in the *societas* or partnership based upon individual rights. In this respect there was no difference to be traced between the various groups in the successive stages of group-life, culminating in the State. The State itself simply formed, as the *societas perfectissima*, the highest stage of a uniform ascending series.

None the less, the theory of Natural Law did not entirely abandon the traditional conception of Group-personality. [It could not afford to do so.] There was too urgent a practical need for some embodiment of the social Whole as a single unity, constant through all the changes of its individual members, and capable of holding a legal position of its own The consequence was that the point of view we have just described [which treats a group as merely a legal nexus between individuals] was only adopted to be dropped again instantly; and the 'legal nexus' was always being transformed into a 'legal Subject' of rights We have already seen that Hobbes had indicated the way by which this ascent from individualism to the idea of the personality of a community could apparently be made. His theory was the point of departure from which the further development of the natural-law theory of the Group-person mainly proceeded.

There was only one writer who remained true to individualism to the very end, and was audacious enough to deny altogether the fact of Group-personality This was Johann Friedrich Horn. Only the Individual, he argues, has any real existence. No union of men is anything more than a *multitudo singulorum*. Even a society which is united enough to form a State is not, in reality, a Whole. It does not constitute, in any way, a *totum*: it is only a sum of persons, which, as such, '*nullam seriem Rerum intrat, et ideo affectiones Entis non sustinet*' (II, c. 1, § 18). Suppose you take a multitude of this sort; suppose you call it by the name of '*civitas*', and then describe it, under that name, as the '*materia*' of a '*corpus*' which is composed of '*membra et partes*'; suppose you then introduce the term '*respublica*', and use that term to denote the '*forma*' which permeates, inspires, and vitalises this body. All you have done is only a matter of pictorial expression, which you have used '*per analogiam et similitudinem*'; and strictly speaking the language you ought to have employed is that of '*quasi-materia*', '*quasi-corpus*', '*quasi-pars*' and '*quasi-forma*' (I, c. 1, § 1; II, c 1, § 1). It is inconceivable, therefore, that a community, as such, should ever be the 'Subject' of rights over individuals. Least of all can political authority belong to the popular community, either originally or

subsequently; either in substance, or in exercise; either in whole, or in part(121). Only in a monarchy can a single 'Subject' of political authority ever be found; and there one man, as the lieutenant of God, becomes the bearer of a transcendental 'majesty' which extends over all individuals (II, c. 1, §§4 sqq). In a republic a 'Subject' of majesty is absolutely indiscoverable. Any *universitas* which it is possible for thought to conceive is nothing but a plurality of *singuli*; and a plurality of 'Subjects' contradicts the conception of indivisible majesty(122). A republic is therefore only a simulacrum of political unity, produced by an imitation of monarchy; and what exists there in reality is only a nexus of *mutuae obligationes singulorum*, founded on a *commune pactum*(123).

This utter denial of the existence of group-unity did not meet with the approval which it enjoys to-day(124) It is true that a number of political thinkers, who limited themselves to describing the relations between Ruler and Ruled, omitted the idea of State-personality from their theory of the State [and, so far as that goes, such writers may be said to agree with Horn]. But their attitude was simply negative; and they were far from intending to make any attack in principle on the idea of a common or group 'Subject' of rights. When real attempts were made to expound a genuine legal philosophy of the nature of social groups, there was a general agreement in assuming the existence of a social Whole which stood above individuals; and differences only began to appear when it came to the actual interpretation of the unity ascribed to this Whole. These differences mainly depended on the extent to which thinkers adopted a Representative or a Collective view of the unity of the Group-person. Both views were compatible with the general framework of the individualistic system; but while those who held the Representative view only sought to fit the idea of a Ruling authority into the scheme of rights of individuals, those who held the Collective view attempted to bring the idea of Fellowship itself under that scheme.

In the thorough-going systems of absolutism the procedure of Hobbes was followed, and the principle of Representation was adopted. The essence of Group-personality was made to reside in the fact that, by virtue of a cession of the powers and wills of all, the Ruler represented each and all of his subjects as a *persona repraesentativa*(125). But even in this connection the principle of Collectivity had to be introduced as a second line of defence. It is true that this principle, even when it was allowed to appear, was

never held to possess a creative or constituent character:* and in regard to monarchically organised societies, it was never allowed to appear at all. But it was applied, as a sort of supplement to the principle of Representation, in order to meet the case of republics, and also of corporate bodies in which an assembly was appointed to act as *persona repraesentativa*. Proceeding on the traditional distinction between *plures ut universi* and *plures ut singuli*, and adding to it the doctrine of the legal equivalence of *universi* and *major pars*, the thinkers of the absolutist school adopted, in order to meet such cases, the idea of the unity of a Collective person, and they made that person the 'bearer' of an ownership of rights. It is obvious that this idea of collective personality was bound to play a greater part in the theory of Spinoza, who regarded democracy as the normal form of the State(126), than it could in that of the orthodox champions of monarchical absolutism(127).

In opposition to the principle of Representation adopted by the absolutists, we find the majority of the natural-law theorists—under the influence of a conception of Groups which was fundamentally a 'Fellowship' conception, such as naturally flowed from the dominant form of the theory of social contract—maintaining the view that all Group-persons were Collective unities, produced by the action of individuals in associating themselves together to form a community. But they too found themselves more and more forced to introduce the idea of Representation, as a constituent factor which was needed to explain the development of Group-unity into a full and complete personality. Huber, for example, starts from the view that the act of association, with the added aid of the majority principle, is capable of producing a Group-person(128); but he proceeds to make the full completion of the unity of this Group-whole depend on a further act which devolves representative authority upon a Ruler(129). Arguing upon this basis, he ascribes the difference between the full and complete personality of the State, and the less complete personality of the *universitas*, to the fact that the representation [of the community]

* I e. the principle of Collectivity (the idea that the Many can collectively form a unity) was never, in any case, regarded by the absolutists as producing sovereignty They would not allow that a collective Whole possesses, by the fact of its existence, an inherent sovereignty over its members They held that, if sovereignty was to exist, there must always be a Representative of the Whole, and they believed that the presence of this Representative could alone produce sovereignty. But they admitted that this Representative might itself be collective —as in a republic, or, again, in a corporate body governed by an assembly.

by the political authority is not subject to the limitations which hold good, both in respect of contracts and of delicts, for representation [of other groups] by other forms of group-authority (130).

The views of Pufendorf: the persona moralis

Pufendorf tried to unite the two ideas of Collective and Representative unity, and he did so by seeking to bring every *societas*—be it State, Church, local community, corporation or family—under the general conception of *persona moralis composita*. Disagreeing with Hobbes [who held that no community could even exist without Representation], he held that this conception of the 'composite moral person' had a constituent or creative character, in the sense that it explained how individuals could unite to form a community possessing the capacity for a common rule of law and a common will (131). Here was a Fellowship basis; but a real person had still to be brought into being upon that basis * To this end (and here he approximated, after all, pretty closely to Hobbes) Pufendorf went on to postulate the subjection of the powers and wills of all to the power and will of a single man or body of men, to the end that the sum of associated individuals should be represented by a 'person' who could act as a single unit (132). He believed that he could, in this way, interpret the fact of Group-personality in terms which made it belong to the same general category as the fact of individual personality But the method by which he arrived at this general category [including alike both Group-personality and individual personality] depended upon a preliminary distinction. He distinguished the conception of legal personality, to which he gave the name of *persona moralis*, from the conception of natural personality He held that the legal world was a world not of physical, but of mental factors—or rather, in view of the fact that it was the moral aspect of these mental factors which was really in question, it was a world of moral factors, or *entia moralia* (133). He regarded these *entia moralia* as being, in themselves,

* In Pufendorf's view, a community can exist on the basis of the conception of a composite moral person This means that it exists on a Fellowship basis, without any need for the idea of a Representative ruling authority to constitute or create it In other words, it is brought into being by the mere conception of the composite moral person, which has thus 'a constituent or creative character' But in order that this person may become 'real', Pufendorf goes on to introduce the idea of a Representative ruling authority, in the person of which the community attains 'real' personality He has not, after all, attained the idea that the composite moral person is 'real' in and by itself.

only attributes (*modi*) which were ascribed by rational beings to physical objects and movements, in order that they might operate with a directing and moderating influence on the freedom of human will, and so regulate human life harmoniously(134).* Now these *entia moralia* stood to one another in the relation of superior and inferior. That relation could best be depicted by our minds, always prone to think in material terms, '*ad normam entium physicorum*'. Accordingly, although all 'moral beings' were, properly speaking, only *modi*, we applied the category of *substantia* as well as that of *modus* in trying to think about them. We regarded some of them as being *substantiae*, which supported (or 'subsisted' under) others, in the sense of being their basis; and we regarded these others as being *modi*, which 'inhered' in those *substantiae*(135) In this way there emerged, as '*entia moralia ad analogiam substantiarum conceptae*', the *personae morales* attributed to human beings under a system of legal order(136). Since the attribute of being a 'Subject' of rights is ascribed to human beings not only as individuals, but also as groups, these *personae morales* may be either *simplices* or *compositae*(137) The *persona moralis simplex* is the individual—not the individual in his totality, as revealed to the senses, but the individual *sub modo*, that is to say in so far as a definite *status moralis* is attributed to him(138) This is the reason why one individual can represent several persons(139). A *persona moralis composita* [as distinct from a simple moral person] is present when a single will, and with it a definite sphere of rights, is ascribed to a multitude of individuals duly and properly united(140). It follows that individual persons and Group-persons have both the same sort of existence [i.e. a moral existence], but both of them are distinct from *personae fictae*, those '*simulacra et umbrae personarum moralium*' (for they are nothing more) which only exist in semblance or jest, without having any legal effect attached to them (141).†

* If you take a physical object (e g. a natural person, regarded as a physical body), or a set of physical objects (e g the natural persons who move together in a group), and then proceed to ascribe to that object or set of objects the attribute of personality, this attribute will operate on your free will, because you will respect the object or set of objects as having the attribute of personality, and it will also introduce into human life the harmony which comes from such respect being paid

† The argument is that the attribute of being a person can only really inhere in an appropriate substance e g. Caligula could give the 'person' of a senator to a fool, but not to a horse; and the 'person' of a senator, as given to a horse, is *ficta*, and only exists in semblance or jest.

It cannot be denied that Pufendorf, in enunciating these conclusions, is entering into a new world of thought. And yet the individualistic basis of his thought prevents him from achieving anything more than a purely formal assimilation of the group-person to the individual. As long as it was merely a question of employing a formal concept, Pufendorf could drive firmly home the principle that the corporate person must be conceived as a 'Subject' of rights, which willed and acted with the same unitary quality as a single person(142). But as soon as the real substratum or basis of these attributes [of willing and acting] had to be defined, difficulties began to appear. Behind the *persona moralis simplex* there stood, after all, the living natural person of the individual, drawing to himself, as *persona physica*, the attribute of personality(143); but the *persona moralis composita* had to find its basis, not in a real Whole, or a living community, but in the artificial outcome of contracts by which individuals had bound themselves to one another(144). Even the validity of majority-decisions was made by Pufendorf to depend merely on an agreement made to that effect(145). A unity thus interpreted in terms of the rights of individuals was in the last analysis only a deceptive sham. closer examination reduced it to fragments, and resolved it into a mere sum of legal relations between individuals

But if Group-unity was thus reduced to a sum of legal relations, it became inevitable that the two different kinds of legal relations on which it depended—the relation of the Representative person to the body represented, and the Collective relation involved in the obligation of partnership—should each of them seek to vindicate its own separate and independent significance. This was exactly what happened in Pufendorf's theory. Springing as they did from different contractual origins [the one from the contract of subjection, and the other from that of society], the two relations were also made to issue in different results (1) Where Group-personality was due to the representation of all by a single person, it became engulfed in the personality of this representative; and the *persona composita* thus dwindled into a *persona simplex* whenever a single man was constituted as Ruler(146). (2) Where an assembly had to represent the Group, that assembly—in and by itself, and without any regard to its representative function—was made to appear as a *persona composita*; and here the term signified nothing more than the union of the many members of the assembly, associated together on a basis of partnership, to act as a single

body(147)....Such contradiction was fatal in its very nature to any successful combination of the ideas of Collective and Representative unity in a new and consistent system of thought.

Here we touch the secret of the peculiar fate which befell the original genius of Pufendorf. His theory of *entia moralia* ceased to be used by his disciples as the foundation of a general philosophy of Law, and it was only applied as a way of explaining a number of legal phenomena which obstinately refused to be brought into line with the facts of the material world(148). The result was that the conception of the *persona moralis* gradually lost the general significance which had been given it by Pufendorf. Thomasius and Titius still followed the master's line of thought(149); but Hert, Gundling and Schmier entirely dropped any reference to the immaterial nature of personality. Applying the term *persona moralis* only to Group-personality, they substituted for Pufendorf's distinction of the *persona moralis simplex* and the *persona moralis composita* a new distinction between the *persona physica* and the *persona moralis, composita, seu mystica*(150). In later writers we find the expression *persona composita* almost vanishing altogether(151); and the term *persona moralis* is made the regular technical term employed in treatises on Natural Law to designate the Group-person(152) This usage was not affected by the fact that many of the exponents of Natural Law, such as Wolff and Daries, gave a new and vigorous expression to the distinction which Pufendorf had drawn between the legal and the physical personality of the Individual(153). In the end the origin of the adjective 'moral' passed entirely into oblivion, and its real sense was forgotten.

With it there also disappeared those tendencies towards the transcending of mere individualism, which were obviously implicit in the conception of a 'composite' person The more the physical person gained in reality, the more the moral person was bound to lose. It now stood by the side of the living individual as an abstract mental scheme, which had the one merit of enabling thinkers, when they were dealing with certain species of legal connections between individuals, to provide a single centre on which such connections could converge. Here the two constructive elements of individualistic social theory [the Representative and the Collective] proceeded again to diverge widely from one another, as we have already seen them diverging in the theory of Pufendorf. Among his immediate disciples, we find the possibility of a purely Collective form of Group-unity again receiving particular emphasis, though

they also continued to maintain, from the other [or Representative] point of view, that full and complete unity was only made possible by the addition of a representative authority(154). There was one thinker, Hert, who succeeded in developing upon this basis an extreme and peculiar theory. On the one hand, he extended the conception of the moral person *usque ad infinitum*. On the other, he refused to recognise any community except the State as a Group-person inherently capable of will and action.

[We may take the latter side of his theory first]. He begins by admitting that the contract of union of *singuli cum singulis* is in itself sufficient to produce the result '*ut paciscentes fiant una quasi persona seu unum corpus*'. But he hastens to add that it is the contract of subjection which first animates this '*rudis et indigesta moles*', and produces an '*anima in corpore*' by transferring the powers and wills of all to a *summa potestas*(155) It follows on this that any group other than the State can only develop a common life as a part of the State, and in virtue of a representative authority derived from the sovereignty of the State(156). [On the other side of his theory] we find Hert laying it down that the Group is only one of a number of cases in which the conceptions 'man' and 'person' are not co-extensive He reduces all these cases under two heads, to each of which he devotes a separate essay—one of them entitled '*de uno homine plures sustinente personas*'(157), and the other '*de pluribus hominibus personam unam sustinentibus*'(158). Appealing to the original sense of the word '*persona*',* Hert argues that all that is really involved, under either head, is a peculiar method of allocating the 'rôles', or parts, which men have to play on the legal stage. On the one hand, the [natural] personality of a single man may be divided among any number of rôles [and thus become any number of legal persons](159); on the other, a number of men may be united together, if need requires it, in a single personality(160). It is plain from the heterogeneous nature of the legal examples which Hert accumulates to illustrate such union that no genuine community can be made to exist on this basis, but only, at most, a formal unity. True, he distinguishes two categories of *unitas personarum* [i e two different ways in which a number of men may form a single legal person], according as the source of

* In Latin, an actor's mask, and so the rôle or part played by an actor. On this basis one man may wear a number of 'masks', in the sense that he carries a number of legal personalities, and *per contra* a number of men may wear a single mask, in the sense that they carry a single legal personality.

such unity is only a legal fiction, or an actual contract. But when we find the second of these categories made to include the *civitas* and the *universitas* equally with marriage, the nexus between *correi debendi et credendi** and the position of joint-feoffees, we can clearly see that his aversion from the idea of a '*persona ficta*'† is only based on the absence of any true conception of a Corporation.

Gundling went further still in the same direction. On the one hand, he made the personality of the State consist only and exclusively in the Representative personality of the Ruler(161); on the other, he interpreted the *universitas* as a purely Collective person(162)—rejecting the view that a 'fiction' was necessary in order to explain the existence of such a person, or its capacity for expressing a will(163), and rejecting it all the more emphatically because he pursued a rigorously Collective interpretation of Groups to its extremest logical conclusion(164) In much the same way as Gundling we also find other writers attempting to distinguish between the Representative personality which the State acquires in the person of its sovereign Ruler and the simple Collective personality [of other Groups](165)

That distinction assumed an acuter form when it came to be connected with another and more general distinction, which had long been drawn in the theory of Natural Law—the distinction between the *societas aequalis* and the *societas inaequalis*. This connection appears particularly in the theory of J G. Boehmer. According to him, the Being of a *societas aequalis* is limited entirely to the Collective unity of its associate members; but when a *societas inaequalis* comes into existence, there appears along with it—superimposed on the 'Fellowship' basis originally present in such a society no less than in the 'equal society'—a Representative unity in which Collective unity now disappears(166) This line of theory, or something very like it, attained a general vogue(167); and it came to be the regular opinion, among those who adopted this view, that the addition of a Ruling authority produced a fuller and completer unity, and that a higher degree of Group-personality

* A body of persons who are joint-debtors or joint-creditors.

† Strictly speaking Hert is not averse from the idea of a *persona ficta*. On the contrary, he applies it to a number of cases of Group-unity (see the beginning of the last sentence of note 160). But he will not accept it as explaining *all* cases of Group-unity, preferring to use the idea of a collective contract of union as a general line of explanation.

was thus attained in the *societas inaequalis* than was possible in the *societas aequalis* (168). At the same time, however, the drawing of this fundamental distinction between unequal and equal societies tended also to erect an increasingly insurmountable barrier between the State and the Corporation (169).

The atomistic conception of the nature of associations in eighteenth-century Germany

There ensued a progressive disintegration of the natural-law conception of Group-personality. The denotation of the term '*persona moralis*' came more and more to be limited to the Collective form of unity constituted by the *societas aequalis*. The more real and active form of unity, which showed itself in the *societas inaequalis*, ceased to be regarded as the result of an internal development of the personality of the Group-whole; it was treated as being the completion of an imperfect Collective person, from without, by a 'Subject' or owner of Ruling authority who was superimposed upon it. This meant that the moral person disappeared from the interpretation of the relation of Ruler and Ruled, and only survived for the interpretation of the relation of Fellowship (170).

This was not all. The increasing rigour with which the conception of purely Collective unity was applied also meant that the moral person gradually lost any real existence of its own [even in its own field of the Fellowship or 'equal society'] The supposed person dwindled down into a mere shorthand description for any sum of individuals which was in any way possessed of social rights or duties. Thus attenuated, the conception only retained, in the last analysis, a sort of technical value for purposes of external application; in other words, it was a term of art which made it possible for several persons to be treated as being a single person, in an area of action common to them all, as regarded their external relations to some 'third party'. Internally, the conception was useless; for if this unity of the moral person was really nothing but a Collective aggregate or sum, it had to be dissolved again into a multiplicity of different persons before legal relationships could be conceived as existing in it. In this way we find a general theory of society developed [in eighteenth-century Germany] in which the conception of the moral person is only applied to the external relations of a society, while its internal life is interpreted, with the aid of conceptions drawn from private law, in terms of *societas* and *man-*

datum,* and is thus reduced entirely to a matter of mutual obligations between so many individuals. On the logic of these principles the State could only act as a Whole, and display the quality of a moral person, in the external area of international law. In the sphere of internal public law, it resolved itself into nothing more than a number of legal relations—the relation between Ruler and subjects; the various relations among the subjects themselves(171). Only in one connection was the conception of the moral person applied to internal public law. If the State as a Whole was not a moral person, parts or elements of it were allowed that quality. When the Ruling authority in the State, or some form of subordinate political authority, was ascribed to a body of persons acting in conjunction, or when, again, the body of the People, as a separate entity, was argued to have rights against the Ruler, such bodies were treated as moral persons. The same general philosophy was equally applied to all forms of Groups other than the State; and theorists were thus content to stop short at a conception of *societas* which made it a moral person externally, and internally only a nexus of reciprocal rights and duties.

All this meant the disappearance of any clear line of logical division between the genuine corporation and the mere 'society' or partnership Internally the law of partnership was made to explain every form of human community, including the State; externally every form of group-relation, including the mere relation of joint-owners of property, was vested with a moral personality(172); and the view continued to be advocated that such personality was equally present, in just the same way, whether a number of individuals were united to form a single 'person', or, conversely, a number of 'persons' were carved out of one individual(173). It is true that this atomistic scheme of ideas was not applied by all thinkers without qualification(174); but it is equally true that it forms the essential basis of the great theories of Natural Law which exercised influence in Germany during the course of the eighteenth century. It dominates entirely the theory of Wolff(175). It is no less evident in that of Daries(176). It is elabor-

* *Societas* and *mandatum* are both, in Roman law, forms of consensual contract between individuals. *Societas*, or partnership, could be used, as we have already seen, to explain the State in the sense of a political society *mandatum*, or agency, to explain the State in the sense of a Government. To Gierke they are both inadequate 'private-law' notions. The true State is more than a partnership of individuals, and cannot be explained in terms of *societas*: the true Government is based on something more than a *mandatum* given by individuals.

ated with laborious care, and with no small measure of juristic ability, by Nettelbladt, whose comprehensive theory of *societas* may well be termed the most mature product of the whole of this movement of thought.

In Nettelbladt's theory the entire world of human groups is depicted as developing, in an uninterrupted series, from the one conception of *societas*; but that conception itself—in spite of the differentiation of form through which it passes, and the constant enrichment of content which it acquires, in the course of his exposition—never gets beyond the limits of individualism (177). At every stage the internal life of the Group appears as a sum of individual obligations; at all stages alike—the Family, the Corporation, the local community, the Church, the State—there never emerges any idea that a community has its own law of being, even in contexts where it is impossible to avoid contrasting the Individual with the Whole to which he belongs (178) Yet Nettelbladt persists in regarding a plurality of persons, when it confronts another 'Subject' of rights in its collective capacity, as constituting a moral person. The moment that the views, the wills and the powers of a number of persons are thus directed externally to some identical object, those persons are held to constitute a single person in relation to that object, and to become a *persona moralis*; and on that basis, 'what is not one being deemed to be one' ('*non unum pro uno habetur*'), they are treated as being equivalent, in the sphere of their common rights and duties, to a *persona singularis* (179).

Achenwall's theory of society is based on a similar foundation. He does not reject entirely the idea of a Group-whole, of which individuals are the constituent parts (180); but like other thinkers of his time he ends by reducing the rights of associations, in their internal life, to a mere aggregate of contractual relations, formed between the associates acting as separate units (181); and like them, again, he will only allow this Collective unity to be conceived as a 'moral person' when it is acting externally, i e. when it is dealing with non-members (182). Scheidemantel, starting from the same assumptions, comes nearer to the idea of a true Group-being composed of individual units (183). Generally, however, we may say that the end of the eighteenth century witnessed an irresistible movement towards the disintegration of the idea of Group-personality in the theory of Natural Law.

This is particularly evident in the controversy, which became

increasingly vigorous, in regard to the basis and justification of the majority-principle. Those who held the Individualistic theory of Society were agreed that the common will of a 'moral person' must essentially mean a unity of *all* the wills of *all* the associated individuals, and that any identification of majority-will with group-will could therefore only be based on a precedent agreement of all individuals to that effect. The older School of Natural Law had regarded such a precedent agreement as an institution which was demanded by the very nature of Group-personality, and was therefore always to be presumed (184). But a new view began to gain ground, which ran in the opposite direction. According to this view, the principle of unanimity was the rule which issued, and must always continue to issue, from the nature of society; and decision by a majority-vote was an exception to this rule for which a special justification was necessary (185).

The appearance of this view marked the disappearance of the last trace of internal group-unity: the 'moral person' was finally degraded into a noun of assemblage, and the common will into a sum in arithmetic Thus we find A L. Schlozer hardly using at all the idea of Group-personality, but expounding, with a stiff pragmatism, a point of view which leads to the conclusion that any collective unity is only a sum of individuals (186), any common will can only be regarded as a 'sum of all particular wills' (187), and any organisation of wills can only exist on the basis of representation of individual wills by a 'foreign' individual will contractually empowered to that end (188). In the same way Christian von Schlozer, in his treatise *De jure suffragii*, resolves the common will into an agreement of individual wills; and he therefore attacks the view that the majority-principle derives its origin from the unity of the Group-personality, arguing that the description of a society as a *persona moralis* is only a metaphor, from which no conclusions ought to be drawn, and contending that the nature of any *societas* ought to be properly investigated before it is thus compared with a person (189). Hoffbauer equally assumes a purely Collective view of the 'moral person' (190) He reduces group-will, where 'equal societies' are concerned, to a union of all individual wills (191), and where 'unequal societies' are in question, to a submission of all other wills to the will of the Ruler appointed to represent those wills (192). Wilhelm von Humboldt goes furthest of all: he demands an express enactment of the legislator, 'that any moral person, or society, should be regarded as nothing more than the union of the members at any given time' (193).

English and French theory in the eighteenth century: Locke and Rousseau

Meanwhile, in England and in France, the resuscitation of the theory of popular sovereignty had produced an attempt to give a more living content to the idea of Collective personality. Here the distinction between *societas aequalis* and *inaequalis* was dropped; and it thus became impossible to explain the development of Group-unity into a Being possessed of authority by referring that development to the institution of a Ruler who stood outside and above the community. If, under such conditions, there was to be any Group-unity which had the capacity of will and of action, and could be depicted as the 'Subject' of political authority, such unity had to be found not in a uniting Representative Ruler, but in the united community itself. The only question which then arose was whether it was possible—and if so, how it was possible—to raise the conception of Collective unity (the only conception possible as long as thought was confined to the limits of natural-law individualism) to the required degree of intensity.

In dealing with this problem, Locke marks but little advance. Although the community, on his own principles, is nothing but a partnership of individuals who remain individuals, he yet makes it also, at the same time, a single body(194) His treatment of the majority-principle is a good illustration of his method. On the one hand, he seeks to derive it from the nature of the community as a single body. All bodies, he argues, must be moved by a single power in a single way; in the body politic, the only motive power discoverable is the superior power possessed by the majority; therefore the identification of majority-will with the will of the whole is a consequence of the Law of Nature and Reason(195). On the other hand, and in the same breath, [recurring to the idea of partnership,] he thinks it necessary to suppose a contractual agreement of all individuals to submit to the future resolutions of a majority, and he makes this agreement the legal basis of the validity of such resolutions(196).

Rousseau occupied himself far more seriously with the problem of raising Collective unity to the dignity of a living and authoritative Group-person. It was a problem which was particularly pressing for him, because he rejected absolutely any idea of Representative unity. He asserts again and again that the social contract produces a moral body equipped with authority over its members; that such a body, like the natural body, is a single and

indivisible whole; and that it possesses an Ego, a life, a will of its own(197). He makes this real Group-being, under the name and style of a 'moral person', the one and only Sovereign, which not only stands on a level with actual individuals in all its external relations, but is also the genuine 'Subject' of political authority internally(198). But vigorously as he sought to depict the substantive existence of this sovereign Group-person, Rousseau was unable to escape from the trammels of a view which made it, after all, only a sum of individuals united in a single aggregate. But how could a contract between individuals conceivably produce anything which was not itself a mere matter of individuals? Rousseau attempts to meet the difficulty. He argues that the associated individual wills blend together in a general will (*volonté générale*), which is no longer the will of all (*volonté de tous*). But all the dialectical arts which he uses in order to prove that the general will is different from the will of all fail to turn it into a genuine common will. In the last resort the whole distinction comes to this —that the will of all is the sum of individual wills, including all their actual variations from one another, while the general will is to be found by adding the concordant motives of individual wills, and excluding all their dissonances(199). The innate character of this general will is not even sufficient to produce the principle of majority-rule; and if majority-rule is to be substituted for it, it must be stipulated for in an agreement—though it is only fair to add that Rousseau regards such an agreement as indispensable(200). The supposed general will is thus, after all, no more than an average of individual wills, to be found by the use of a ready-reckoner. Only a miracle can enable it to show the higher qualities which Rousseau poetically credits it with possessing(201).

[Just as the general will stays at the level of an average of individual wills, so] the sovereign Group-person never rises beyond the sum total of individuals who constitute the society at any given time. The same persons who are governed, in their capacity of subjects, also constitute the sovereign in their other capacity of citizens(202). Each is, in part, the joint-owner of a sovereign authority to which, at the same time, the whole of himself is subject*(203). Corresponding to this double position [of subject and

* Compare the epigram of a French writer. 'The modern Frenchman looks with pride at his face in the glass as he shaves in the morning, remembering that he is the thirty millionth part of a tyrant, and forgetting that he is the whole of a slave'.

citizen], in virtue of which the individual can contract with himself and owe obedience to himself, there is a double series of obligations which the social contract creates for the individual (204). But while the individual thus incurs obligations, it is inconceivable that the sovereign community should be bound, either by the social contract itself, or by any other sort of law (205). It can undertake obligations, in the same way as an individual, in reference to third parties (206): it can never oblige itself, as a Whole, to any of its own members (207). By its very nature,* this sovereign moral person manifests itself totally, and manifests itself exclusively, in the assembly of all (208). It manifests itself totally in that assembly, in the sense of being so identical with it that each new assembly cancels the whole of the previous political and legal situation; and each new assembly, therefore, unless it prefers an alteration of that situation, or a modification of it, has to give it the validity which it would otherwise lack by an act of express or tacit confirmation (209). [As it manifests itself totally in the assembly, so also the Sovereign manifests itself exclusively in that body.] In it, and in it alone, can the Sovereign show itself a being which acts and wills (210). Any form of 'Representation' of the sovereign Collective being is incompatible with the very conception of that being (211). The moral person is so entirely bound up with a visible aggregation of individuals, that no idea of any 'Organ', through which the invisible but living unity of a social body attains an active expression, can ever possibly emerge (212).

But in spite of his theory of the primary assembly, Rousseau is forced to provide some sort of permanent organisation for the community, and to fill in some way the void which he has created by abolishing the Representative unity involved in the existence of a Ruler. He therefore devises an ingenious system by which the sovereign moral person creates, in the shape of an administrative body (*gouvernement*), a second moral person—subservient to itself, but yet possessing a life of its own; acting with a delegated and dependent authority, but acting none the less (213). But this secondary moral person turns out, once more, to be only a Collective unity, composed of individuals, and never transcending the individuals who compose it (214).

The theory of Rousseau exercised a great influence on the natural-law theory of Group-personality (215); but even in France,

* By its very nature—as being one with *all* its members, from whom it can never separate itself, even for the purpose of obliging itself.

where it passed into the programme of the Revolution, it was considerably modified, mainly in the direction of bringing it more within the bounds of political possibility. It was Sieyès who, more than any other writer, gave to Rousseau's theory the popular form in which it long continued to inspire the political doctrines of Radicalism. Like Rousseau, he identified the moral personality of the social body with the sum of its individual members, regarded as a single aggregate(216); like him, he identified the common will with the will of all(217); like him, again, he identified the will of all with the will of the majority, in virtue of an agreement of all supposed to have been made for that purpose(218). But Sieyès restored the idea of Representation which Rousseau had rejected; and he therefore regarded a Collective unity as not only operative in a primary assembly of all its members, but also willing and acting through its appointed representatives(219). He was thus able to eliminate from the State the idea of a separate moral personality of the Government, which had been introduced by Rousseau—substituting, in its place, a scheme by which a variety of different bodies represented the sovereign community(220).

Fichte and Kant

In Germany, the writers who clung to the theory of the Sovereignty of the Ruler adopted only isolated elements of Rousseau's doctrine(221). Fichte, however, as a professed adherent of Rousseau's theory of Popular Sovereignty, attached himself also to Rousseau in his speculations on the nature of Groups; but as he was pledged to an even still more drastic form of individualism, he employed an even more artificial method of arriving at a real social Whole—only to remain, in the end, even further removed from any idea of a real and living Group-being. In Fichte's view, a civil society is simply an aggregate of so many associated individuals. But it is only with a part of their personality—not with their whole being or their entire selves—that individuals combine to form this 'protecting body' or insurance society. So far as they are included in it, they now constitute, in their association with one another, the sovereign 'Subject'. Each person is thus, from one point of view, a 'partner in sovereignty'; but each still remains, from another, a 'free individual'(222). Nevertheless, Fichte proceeds to argue that the State is a single 'body' and a 'real united Whole'. With the conclusion of the contract of union, all in their particularity are henceforth confronted by all in their association; and all in their

association are a real, and not an imaginary Whole—they are a true universal (*Allheit*) in the sense of a *totum* 'which is one by the very fact of the case', and not a sum total of units (*Alle*) in the sense of a mere *compositum*. This Whole is the other party to the contract; and it receives its consummation from the fact that each individual makes a contract with it, pledges himself to protect it, becomes a part of it, and identifies himself with it. 'In this way,' Fichte writes, 'by means of contracts of individuals with individuals, the Whole comes into existence, and it is then consummated by the fact that all individuals [as such] proceed to contract with all individuals as a whole'. But how is this transformation of multiplicity into unity really achieved? Simply by a process of abstraction. The act of union, Fichte argues, is not directed to the protection of this or that determinate individual; since each person may, or again may not, be the first to be attacked, it is directed to the protection of all indeterminately Now 'this indeterminacy, this uncertainty which individual will be the first to suffer attack, this consequent wavering of the imagination, is the bond of union, and the reason why *all* coalesce into *one*' (223).

A Whole thus constituted cannot possibly be a living being. Fichte may compare it, as he repeatedly does, with the organic structure of a natural product; but all he gains from the comparison is the idea of a reciprocal relation of parts, and not that of a living unity of the Whole. He thinks it most appropriate to compare the State to a tree, in which each single part has consciousness and will. Every part of a tree, however much it may want its own self-preservation, is compelled to will the survival of the tree, because its own survival is only possible on that condition. Strictly speaking, the tree itself is 'nothing to the part but a mere idea, and an idea cannot be injured But the part really wishes that none of the parts, whichsoever it be, should be injured, because, if any be injured, it must suffer itself simultaneously. It is otherwise with a heap of sand, where it may well be a matter of indifference to one part, that another should be parted from it, or trodden underfoot, or scattered'. Throughout the course of his subsequent exposition of the organic nature of the social Whole, Fichte never departs from this general view The parts of such a Whole, like those of a tree, are only what they are in virtue of the connection of the Whole, and the life of each part is therefore conditioned and determined by the life of every other part; but this life of the parts is all that constitutes the life of the Whole, and the only unity that

exists is the common factor of reciprocal interdependence present in every part(224).

If the 'organic Whole' is thus left as an abstract conception, it can have no effective personality of its own. Fichte, it is true, sometimes places 'mystical', 'moral' or 'juridical' persons by the side of 'physical' persons; but all that he means by these terms is relations of connection between individuals(225). To the State, as a whole, he never applies the category of 'person' at all. Even in the sphere of external relations, he does not employ the idea of State-personality: he derives public international law, no less than private, from the legal relations which arise as the result of contracts between individual citizens of different States 'A relation between States is always based on a legal relation between their citizens. The State *per se* is an abstract conception: only the citizens, as such, are real persons'(226). In its internal life, the body politic is ruled, in Fichte's view, by 'common will', which he derives, in the same way as Rousseau, from the united wills of all, by the process of making each will shed its particularity, and adopt as its only object the rule of right which is common to all(227) In one respect, he goes even beyond Rousseau he rejects the majority-principle, opposing to it, with an eager advocacy, the principle of unanimity, and only making the limited concession that an overwhelming majority may be allowed, in special cases, to enjoy the right of declaring dissentients to be non-members(228) He follows Rousseau generally in thinking that the true realisation of the general will is only possible in a primary assembly of all the citizens(229); he departs from him in admitting that, within certain limits, the representation of the general will by duly appointed deputies may not only be possible, but even necessary(230). But he never abandons the principle that the community must always hold the position of a sovereign principal, which can always override the 'presumptive common will' of its agents by a declaration of its own actual common will(231). He is so far removed from any idea of a corporate 'Organ' that he even insists on excluding all persons who hold political office—whether popular representatives or administrative officials—from membership of the community; and he treats such persons as mandatory agents of the remainder which is left when they have been subtracted from the body of the whole(232). In his later writings Fichte considerably changed his original theory, and advanced towards a really organic view of society(233). But he never broke away altogether from his pre-

vious system of ideas; and the 'higher view of the State', which he preached in his later days, never reached the stage of a definite expression in terms of juristic ideas(234).

This mixed view of the nature of the Group, half individualistic and half collective, was one which even Kant was unable to transcend. Limiting the conception of personality entirely to the individual, in his capacity of a free rational being(235), Kant leaves no room for any real Group-personality. Occasionally, it is true, he applies the term 'moral person' to denote a complex of individuals. While he is singularly silent, in treating of corporations and charitable and other foundations, about the question of their personality(236), he regards the relations of States under international law as a relation of 'moral persons'(237); and in the sphere of internal public law he treats a number of bodies as separate 'moral persons'—e.g. the bodies which exercise the three different 'powers'; public boards; the People itself(238) But what he means by this term, which he never explains in any detail, is obviously nothing more than a sum of individuals regarded as a single aggregate. In particular, his conception of the People is only a Collective or 'Bracket' conception (*Sammelbegriff*), which may be used to signify either the aggregate of the State's subjects, or the aggregate of its active citizens, and may therefore be either contrasted or identified with the idea of the State, according as it is used in one or the other sense(239). He may proclaim that in the ideally rational form of State, which is the only legitimate definitive form, sovereignty belongs to the People: the fact remains that the sovereign People is nothing more than a mere sum total of associated individuals, just as it had also been for previous thinkers(240). In his view, as in theirs, the general will which is the true Ruler is produced by a union of all individual wills, and appears in the form of an agreement between them all(241); and thus the political methods of majority-decision and representation, which are indispensable in all large States, can only be justified on the ground of their having been adopted 'with *universal* assent, and therefore by means of a contract'(242).

But here again, as we have seen before, Kant finds a way of depriving his theoretical individualism of any practical importance. By pressing his distinction between *homo phaenomenon* and *homo noumenon*, and by making the individual co-operate in the creation of the general will 'only in his pure humanity' as *homo noumenon*—i.e. only in so far as 'pure reason, which lays down the rule of

right', displays itself in him(243)—Kant really eliminates personality from his scheme. He depersonalises the Individual, in his capacity of joint sovereign, into an abstract rational being; he depersonalises the Group-will into an objective content of will issuing from abstract reason(244). He loses any conception of a living 'Subject' of the common sphere [of social authority]; he substitutes in its place the idea of an impersonal will of law—a will remote from actual concrete wills; a will of which individuals are instruments; a will in whose service these instruments have to work, under a system of strict dependence, at a task which is common to them all.

General Retrospect

Looking back at the development of the natural-law views of the being and essence of groups, we can see that stone upon stone has crumbled away from the theory of Corporations which had been built up by the Roman lawyers and the canonists. The collapse of that theory becomes complete when Natural Law expressly rejects, and ends by banishing altogether, the conception of the *ficta persona*. In the general theory of society which takes the place of the old theory of Corporations, the School of Natural Law uses the conception of the 'moral person', for which it claims a higher degree of reality, to fill the gap created by the disappearance of the fictitious person; and it attempts, but owing to its fundamental individualism it attempts in vain, to give a real existence to this moral person. In its treatment of the formal structure of the social connections between individuals, the School of Natural Law adopted the contractual scheme of *Societas* and *Mandatum*, and it broadened and deepened this scheme, in many directions, with the aid of conceptions derived from Teutonic ideas of Fellowship and Kingship (*Herrschaft*). But imprisoned within the limits of that contractual scheme, it was never able to attain the idea of the inherent and independent existence of a social Whole. It could only achieve its doctrine of the moral personality of groups by combining, in one way or another, two different conceptions—the conception of Collective and that of Representative unity; and on either conception the Whole is no more than the associated individuals of which it is composed. The existence of the 'moral person' is thus only a fact because it coincides, and to the extent that it coincides, with the existence of individuals; and the unity

of will and power in a Group-person is only a reality because, and only a reality in so far as, individuals are actually willing and acting as one, either on the Collective basis of unanimous agreement, or the alternative basis of Representation by a single person or body.

On such a view, the 'fictitious person' has indeed disappeared; but with it there has also disappeared any 'person' of any sort which is in any way separate from individuals. The Being of each Group is reduced to the mutual legal relations of its members; and the 'moral personality' is only a formal conception which serves to indicate, as a shorthand expression, certain legal results involved in these relations of connection In such a circle of ideas, a Group-being with a single life of its own is something inconceivable; and a purely mechanical view of society is the inevitable result. Occasionally, even in the strictest individualistic systems of Natural Law, the traditional organic metaphors and similes continue to be adduced(245): they are even used to some extent (as we have already seen in dealing with Locke, Rousseau and Fichte) as technical terms of art for the purpose of expressing the nature of group-unity(246). But Hobbes, in referring to the 'artificial life' of automata, had already built a bridge by which it was easy to pass from the conception of social organism to that of social mechanism. The precedent he had set was not neglected; and we often find that even when society is formally ranked as a moral body by the side of natural bodies, it is really regarded as merely an artificial imitation of the living organism(247) For Locke and Fichte, and even for Rousseau, the social body is in the last analysis only a mechanically constituted Whole, with a life which only resides in the life of its parts(248) It is hardly surprising, therefore, that as the doctrine of Natural Law developed, modes of expression derived from an organic point of view often disappear entirely, or sink into an empty form of words(249); and the analogy of an artificially constructed machine more and more takes the place of the natural body in the interpretation of the social Whole(250).

It was impossible for the idea of an organic Group-being to disappear entirely, so long as the individualism of the School of Natural Law was still confronted by any really vital philosophy which made the Whole its basis and starting-point. But that idea was seldom, if ever, developed clearly to its ultimate results, and still less was it ever expressed in any juristic form. Least of all was any attempt ever made to conceive in terms of personality the living unity immanent in an organic Group-being. Even the

thinkers who were most opposed to a purely individualistic interpretation of society evaded entirely the question of Group-personality(251). There were others who only attained the conception of a moral person to fall back instantly on the idea of a merely Representative or merely Collective unity(252) Even Leibniz, unable to rise to the conception of the personal existence of the group, was content to crown his nobly planned edifice with a shadowy *persona ficta*(253). Nor is there, in any of the social theories of the eighteenth century which prepared the way for an organic view of historical development, anything more to be found than the merest germ—the dormant and undeveloped germ—of a legal interpretation of the living Group-personality(254).

CHAPTER II: Section I, § 17

THE NATURAL-LAW THEORY OF THE STATE

I. General View

The general natural-law theory of Society culminated in a 'natural' theory of the State. Within that theory, the subject of natural public law, under the name of '*jus publicum universale*', gradually vindicated an independent position as a branch of study distinct from 'Politics'*(1).

So long as the State was simply treated as *societas perfectissima*, and so long as its theory was simply regarded as an illustration (if the best and completest illustration) of the general conception of *societas* already described in the previous subsection, the ideas which found most vigorous expression in natural-law theories of the State were merely the general ideas about the nature of Groups with which we are already familiar; and these general ideas were freely applied, whether their ingredients were consistent with one another or contradictory But a new situation arose, and thinkers were confronted by fresh intellectual problems, as soon as they turned to face the conception of Sovereignty (which still continued to be the essential core of the theory of the State), and attempted to bring it into harmony with their conception of *societas*.

* Natural public law is what we might call 'general first principles of constitutional law'. Politics (*Politik*), as distinct from it, means the practical study of political methods and institutions.

These problems arose from the fundamental difficulty of uniting a traditional conception of sovereignty—which at the bottom nobody wished to disturb, or indeed, in view of the political trend of the age, could think of disturbing—with the general idea of the Law-State (*Rechtsstaat*) which was inherent in the essence of Natural Law. If, on the one hand, the logical evolution of the conception of sovereignty were permitted to run its course freely, it inevitably followed, however much the dictates of God or of Reason might still be exalted above the authority of the State, that the internal system of political relations was deprived of any of the attributes of a genuine system of law. On the other hand, if Natural Law were not to annihilate itself utterly in the way indicated by Hobbes, it was bound to retain the Teutonic conception of the State as a system of legal relations It was the latter of these tendencies that actually showed itself strongest; and the whole of the natural-law theory of society shows an increasingly conscious and vigorous effort to interpret the State, like every other *societas*, as a system of reciprocal legal rights and duties. But the conflict between the idea of sovereignty and that of the Law-State involved a number of compromises or concessions, which could only be made at the expense of strict logic First and foremost, owing to the growth of an idea which we have already had reason to mention—the idea that there was a part of the original sovereignty of the individual which had not been surrendered in the contract of civil society, so that a sovereign Individual still remained to confront the sovereign State—it became possible to maintain that the individual citizen had his own inherent rights, which stood over against the authority of the State. In the second place, and on the same basis of argument, it could also be maintained (as we shall have to show later on) that in the area of their mutual relations all groups had their own inherent rights, which were not abolished by the fact of inclusion in a higher sovereign group. Finally (and here we touch the only point specifically relevant to our present theme, which is that of the internal structure of the State in itself), it came to be held, in defiance of the logical demands of the conception of sovereignty, that political authority was by its nature divided, in one way or another, into a number of independent spheres of right belonging to a number of different 'Subjects'.*

* The first point raised in the latter part of this paragraph touches the relation between the State and the Individual, and the limitation of State-sovereignty by individual rights. The second turns on the relation between the

Prima facie, the adherents of the School of Natural Law may seem to have found the clue to the solution of this fundamental antinomy [between the idea of sovereignty and that of the Law-State] in the conception of State-personality which they finally succeeded in attaining. This would have really been the case if only they had conceived the State [not merely as a 'moral person', but] as a living Group-person. On that basis, it would have been an easy step to explain the apparent antinomy between the idea of a united and indivisible sovereign power and the idea of a constitutional division of powers by drawing a contrast between the unity of the State-personality and the plurality of its organs. But the idea of a true Group-being could never be elicited from the natural-law conception of Group-personality, as that conception had actually developed on the basis of individualism. The natural-law *persona civitatis* might be depicted as 'Representative' or 'Collective'· in neither case could it ever transcend the category of Individuals; in neither case could it ever possess an inner being which could be formulated in juristic terms. Under these conditions each new attempt to give a more definite expression to the personality of the State as a Whole only meant a new obstacle to the development of the theory of the constitutional State. It is not a mere accident that we should find the advocates of the theory of absolute sovereignty laying the greatest emphasis on the idea of State-personality, or that a tendency to the doctrine of constitutionalism should always go hand in hand with a tendency to eliminate that idea

In the light of these considerations, it is easy to see that the controversy about the 'Subject' of sovereignty, which still continued to agitate men's minds, could hardly be settled by simply admitting the principle (first propounded by Hobbes, and never forgotten afterwards) that the State-personality, in itself, was the real 'Subject' of sovereignty.

State and the Group, and the limitation of State-sovereignty by Group-rights. The third concerns the limitation of the State in its own internal character, apart from any question of its relations to Individuals or Groups Since the general theme of the present passage is that of the accommodation of the idea of sovereignty to the idea of the Law-State, Gierke remarks that the third point is the only one which is specifically relevant to this general theme In other words, the system of division of powers attempts to make sovereignty a legal structure in its own inner nature, and thus seeks to effect a real reconciliation of sovereignty and Law, while to let the Individual, or the Group, 'contract out' of sovereignty, in the sphere of inherent rights, is still to leave sovereignty, in the rest of its range, unlimited by Law.

We may admit that the formal conception of State-sovereignty which was attained by the use of this principle was not altogether without value. But we must also recognise that this conception was not suited, in its actual implications, to lift thinkers above the alternatives of the sovereignty of the Ruler and popular sovereignty. Its effect was rather the opposite. Failing to provide any firm foundation for the views of theorists who sought to mediate between these alternatives, the conception of State-sovereignty as inherent in the personality of the State was mainly used as a cloak for doctrines of the unlimited sovereignty either of Ruler or of People. Being a purely *formal* conception, it was entirely devoid of any substantive internal content; and it could not, therefore, be developed into a concrete and actual conception of sovereignty, as resident in a whole Group-being which manifested itself in every one of its parts This will explain why the advances that had already been made in this direction [i e in the direction of the idea of the sovereignty of the whole Group-being] now found themselves doomed to suppression. The theory of a 'double majesty', which had once held sway [and which had made both King and People sovereign, thus vesting sovereignty in the *whole* body politic], was no longer defended by any thinker If it was mentioned at all, it was only by the advocates of the sovereignty of the Ruler, and only for the purpose of rejecting it as a deplorable error(2). The theory of the *subjectum commune* of 'majesty' [which made the whole body politic the general or 'common' Sovereign, acting through the Sovereign 'proper' as its organ] only survived in a few scattered writers; and it failed to yield them the results for which they hoped even when they sought to combine it with the conception of the moral personality of the State(3). The few who adopted this theory transformed it so utterly, in order to save the reputation of its author [Grotius], that it lost any particular meaning(4); but the majority of writers simply rejected it altogether, as running dangerously near to the theory of popular sovereignty(5). The two opposing theories of the absolute sovereignty of the Ruler and the absolute sovereignty of the People were thus left alone in the field; and thinkers who sought to advocate the cause of constitutionalism found themselves faced by the difficult task of attempting, with the aid of no better tool than one or other of these theories, to wrest some soil from the hard ground of sovereignty, in which a theory of constitutional rights might be made to grow.

II. The theory of the Sovereignty of the Ruler

At first, as we should naturally expect from the general historical development on which the events of the Thirty Years War had set their seal, the victory lay with the theory of the sovereignty of the Ruler. The advocates of that theory were agreed that the State, as the 'Subject' of supreme authority, was to be identified with the Representative personality of the Ruler. Except for Horn, whose attempt to treat the monarch as the only possible 'Subject' of real political authority was universally rejected(6), they all maintained that the Ruler might be either a single or a collective person, according to the form of the State, but they did not believe that any difference in the scope and the content of his sovereignty was created by this distinction(7) On the other hand, they refused to allow that the People, as such, had any share in sovereignty, after the State had once been formed(8), and even in regard to democracies they drew a sharp distinction between the sovereignty of the community, in its capacity of constituted Ruler, and the original sovereignty of the People, which was supposed, in all forms of State alike, to have come to an end with the transformation of civil society into a State(9).

The question, however, remained, whether there did not still continue to exist a Collective personality of the People which [if it was not the 'Subject' of sovereignty] was, or at any rate might be, a 'Subject' of popular rights as against the Sovereign.

On the absolutist side, which followed the line of Hobbes, and pushed the conception of a single and unique State-personality to its logical conclusions, the question was answered in the negative. It was held that the People only became a person in the Ruler: apart from him, it was but a disunited multitude As a governed community, the People was therefore destitute of any capacity for rights; and conversely, the instant it was recognised as a 'Subject' of rights, it also acquired, by that very fact, the position of Ruler. A difference of opinion arose, however, when it came to the drawing of conclusions from these premises in regard to the possibility of a constitutional State. The stricter school of absolutists held the view that a system of constitutional law legally binding upon the sovereign was a thing which was utterly inconceivable. The extremist theories of Hobbes were, indeed, rejected: a sphere was reserved to the individual, beyond the reach of the State: the authority of the State was held to be subject to a fixed standard of

action, whether derived from Divine command or from the command of Reason; but any limitation imposed by positive law was held to be incompatible with the essence of sovereignty. This was the reason why the conception of a constitutionally limited Monarchy was regarded [by the absolutists] as particularly objectionable. There might be differences of opinion among them in regard to the propriety and the real character of other historical developments of a constitutionalist type; but there was a general agreement that a Monarchy which was constitutionally limited was not a Monarchy at all. This was the line taken by Spinoza(10); by the advocates of absolute monarchy in England(11) and France(12); and by many of the political thinkers of Germany(13) On the whole, however, this drastic theory of the sovereignty of the Ruler was prevented from finding a footing in Germany by its incompatibility with the legal situation which actually existed in that country; and a more moderate opinion prevailed which, while it kept to the general principles of the absolutist doctrine, admitted, in one way or another, the existence of constitutional limitations on sovereignty. Horn himself, vigorously as he rejected any diminution of regal majesty by popular rights, admitted that there were differences in the *modus habendi majestatem*. Even in the case of absolute monarchy he assumes a difference of degrees, according as there is a *dominatus* with an *exercitium absolutissimum* of 'majesty', or a *regnum absolutum* with a less drastic exercise of ruling power, or a dictatorship limited in point of time; and by the side of these absolute forms he also recognises a limited monarchy, in which the monarch is under a contractual obligation, in exercising his 'majesty', to observe certain conditions, or even (it may be) to take the advice of certain persons. He does not, however, regard the fulfilment of such obligation as a matter which admits of any form of legal sanction(14).

But the writer who took the greatest pains to prove that supreme authority was not necessarily unlimited was Pufendorf(15). [There are, indeed, some elements in his theory which run in an opposite direction.] He regards the personality of the People as absorbed entirely by its representation in the person of a single Ruler or body of Rulers. In other words, he makes the *persona moralis composita* of the State manifest itself so fully, and so exclusively, in the Sovereign, that everything which the Sovereign, as such, may will or do must be counted as the will and action of the State; while anything that one man, or many, or all, may will or do apart

from the Sovereign, must be counted as a private will or a private activity—or rather, not an 'activity' [since the word implies some unity], but a multiplicity of activities(16). He is thus led to follow Hobbes in denying that the governed community can possibly have any rights against its governor; though, unlike Hobbes, he makes individual subjects enjoy rights against the government, which are real, if imperfectly guaranteed, rights(17). But Pufendorf [also leaves room for the principle of constitutional limitation. He] incorporates in his theory (primarily with reference to monarchy) the idea of differences in the *modus habendi* of 'majesty'. Over against the patrimonial 'mode' or form, under which political authority is *in patrimonio imperantis*, he sets what he regards as the normal form, under which the Ruler for the time being enjoys only a right of usufruct in political authority, so that he cannot by himself dispose of the substance of political rights either *inter vivos* or by will(18). Moreover, he recognises that, side by side with the *imperium absolutum*, which is only limited by the rules of Natural Law, it is possible to conceive an *imperium limitatum*, where the king is limited by a constitution in exercising his sovereignty, and where he needs the assent of the people, or of an assembly of representatives, for some of his acts of government. In spite of these limitations, he argues, the supreme power still remains with the monarch, undivided and unmutilated; nor is any disintegration of the unity of the State's will involved in them, since it still continues to be true that '*omnia, quae vult civitas, vult per voluntatem Regis, etsi limitatione tali fit, ut, non existente certa conditione, Rex quaedam non possit velle aut frustra velit*'. The assent of the People, or the Estates, is therefore not the *radix*, but only the *conditio sine qua non*, of the exercise of political authority; and such right of assent confers no share in that authority upon either People or Estates. Even a *clausula commissoria*, which has the effect of making the monarch forfeit his authority if he transgresses its limits, fails to alter the situation: only a *conditio potestativa* is contained in such a clause, and the cognisance of the question, whether that condition has come into play, will be a matter of *nuda contestatio*, and not of judicial decision.* On the other hand, if the unity of the State is not to be

* In England, we might say that the Bill of Rights is a *clausula commissoria* for succeeding monarchs if any of them violates its terms he forfeits the throne But the Bill only recites the condition on which this *may* happen (*conditio potestativa*); and the question whether the condition on which this may happen has actually and really appeared is not a question for a court (none is provided in

disintegrated and the essence of monarchy destroyed, the monarch should never be obliged to allow the positive substance or object of his volition to be imposed upon him by a foreign will. He must accordingly preserve full liberty to summon or dissolve the assembly of the People or the Estates, to lay proposals before it, and to accept or reject its decisions; and he may also, in the interest of the public welfare, amend the fundamental contracts on which the State is based, if they are leading to its dissolution(19).

Pufendorf's theory attained an extraordinary vogue. It continued, in its main lines, to determine the character of the natural-law theory of the State till the middle of the eighteenth century, and even later. It was adopted, almost unchanged, by Thomasius(20), Titius(21), Gundling(22), and others of his disciples(23). It also received the allegiance of both the Cocceji(24), Stryck(25), Ickstatt(26), Kreittmayr(27), Heincke(28), and other advocates of the absolute authority of the territorial prince(29). It was pushed in the direction of absolutism, and given a more rigorous form, by J. H. Boehmer(30) Conversely, there were other writers who modified it in the opposite direction, and sought to give a wider scope to the doctrine of constitutional limits(31). In particular, a number of writers disagreed with Pufendorf's admission of the patrimonial form of State, regarding it as logically inconsistent with his other ideas, and holding that it could never be possible for a Ruler to dispose of the substance of the State without the assent of the People(32) On the whole, however, we may say that the general fate which befell Pufendorf's views was that his theory of sovereignty was accepted, so far as its practical results were concerned, but its ingenious basis [which reconciled popular consent with sovereignty by making it the *conditio sine qua non* of the exercise of sovereignty] was sacrificed, and the old antithesis between the rights of the Ruler and the rights of the People was re-introduced.

This antithesis, and with it the conception of a Collective personality of the People as still continuing to confront the Ruler, was steadily maintained by the thinkers who, while professing the general theory of the sovereignty of the Ruler, were mainly influenced by constitutionalist tendencies. Critics might censure, and censure with good reason, the disintegration of the unitary personality of the State which was involved in such a position: the

the Bill), but for mere assertion (*nuda contestatio*) by Parliament or People. Blackstone says much the same in his *Commentaries*, I, pp. 211–14. But Pufendorf was writing, of course, before the Bill of Rights.

fact remained that, so long as Natural Law was the basis of thought, it was only possible to safeguard the conception of popular rights, while rejecting the theory of popular sovereignty, at the price of admitting a dual existence of two personalities—the personality of the Ruler and that of the People. Even the strict absolutists themselves had to recognise, if once they admitted the theory of contract, that the People must possess, at the very least, some dormant or latent form of personality; for as soon as they argued in terms of contract, they were not only bound to make the original sovereignty of the community the premise of their argument—they were also bound to acknowledge that sovereignty might possibly revert to the community in which it began (33). A complete break with the whole theory of contract was necessary before the idea of the personality of the People could be entirely eradicated (34). But if it was possible for the People to exist for a single instant *in the absence* of a Ruler, there was no logical objection to the idea that it should also continue to exist, as a personality, *side by side* with the Ruler. [Not only was there no logical objection against the idea; there was also a logical argument in its favour.] It was obviously far more consonant with the idea of contract to hold the view that, after the conclusion of the contract of subjection, the community still confronted the sovereign as a party to that contract, than to profess the theory that the community itself expired in the act of concluding the contract, and that the contract produced rights and duties for individuals only. These considerations will explain why the old conception of political relations, as relations of contract between Ruler and People, always continued to persist. The *persona civitatis* was held to be merged in the *Imperans*, but the governed community was none the less regarded as a separate collective person, for which certain rights were in every case reserved, from the very first, by the terms assumed to be contained in the original contract, and to which more extensive rights might be granted [in particular cases] by express constitutional provisions to that effect.

It is along these lines that Huber attempts a general interpretation of the constitutional State, which deserves particular attention. He begins by postulating that in every State the Ruler, and the Ruler only, is vested with 'majesty', and that no difference in the form of the constitution, or in the method of its acquisition, or in the *modus habendi* under which it is exercised, can vary or alter this majesty (35). But he proceeds to argue that in every State the right of the Ruler is confronted by two other sorts of rights—the

rights of individuals, and the rights of the popular community—which bind and limit the supreme authority, though they do not affect its essence (36). The source of popular rights is the *leges fundamentales*, which, however, are really 'contracts', and not 'laws' (37). Some of these rights exist in all States: they are the results of the self-evident terms of the original contracts (*leges fundamentales tacitae*) (38). Others may be either originally reserved, or subsequently secured, by express agreements to that effect (*leges fundamentales expressae*) (39); but rights of this latter order cannot go beyond a certain point, unless a system by which the People participates in the office of Ruler has taken the place of a system of limitation of the Ruler's rights (40). Huber accordingly assumes that there are always two 'Subjects' of political rights. On the one hand there is the personality of the State, which he identifies, in exactly the same way as the absolutists, with that of the Ruler (41): on the other, as he expressly contends, the People also *jus personae retinet*, and continues to be a *universitas* (42). In developing his theory Huber delivers a vigorous attack on every kind of absolutism, popular as well as monarchical, in every kind of State (43). But if he is consistent in that respect, he fails to reconcile the inherent self-contradiction which clearly reveals itself in his theory when it comes to be applied to democracy (44).

In much the same way we find the German political writers who attempted to find an independent basis for the rights of the local Estates of the German territorial principalities (*Landstande*) still holding to the idea of a contractual relation between the prince, as representing the 'State', and the 'People', as represented by the Estates (45). The conception of sovereignty was severely limited by many of these writers (46); and Leibniz, too, though he failed to transcend the traditional doctrine in his view of State-personality [as resident only in the Ruler] (47), attempted to broaden the whole basis of argument for constitutional limitations on the Ruling authority. He delivered a vigorous attack on the academic conception of sovereignty; and arguing that all human relations are necessarily conditioned [and therefore cannot be 'absolute'], he rejected any idea of absolute sovereignty in favour of a conception which made it no more than relative (48).* For the time being, Pufendorf's doctrine triumphed over that of Leibniz; but there

* In other words he held that there is no absolute sovereignty, free from and unrelated to conditions of time and place, there is only a relative sovereignty, which exists under and subject to such conditions.

were many of Pufendorf's disciples who had already begun to revolt against the complete absorption of the People in the Ruler (49). Hert, Schmier, Heineccius and other writers, while following Pufendorf in other respects, recur to the idea that the State must include a collective personality of the People as well as the sovereign personality of the Ruler (50). Occasionally, too, we find writers [who start by assuming that the Ruler is the only 'Subject' of rights] slipping imperceptibly over into the idea of rights of the People [which implies that the People is also a 'Subject' of rights]; nor indeed was it easy, when it came to the point, to maintain intact an artificial interpretation of the State which limited the Ruler by the Group-will, and yet, at the same time, left no 'Subject' of will other than the Ruler *

By the middle of the eighteenth century we can trace a general change in the theory of Natural Law, which makes it more favourable to the principle of popular rights. It is a change which naturally accompanies the disintegration of the conception of State-personality, and the consequent weakening of the conception of sovereignty, which we have already described. In the writings of Wolff [1740–50] the sovereignty of the Ruler almost ceases to appear as a definite antithesis to the sovereignty of the People. He holds that the People is free to choose whether it will retain in its hands the right of controlling its members, which the contract of society creates for the community that it constitutes, or whether it will devolve that right in one way or another—either on one person, or on several; either wholly, or in part; either unconditionally, or on such conditions as it chooses to impose; either revocably, or irrevocably; either for a time, or for life, or with rights of succession; either in substance, or merely *in exercitio* (51). If the People decides upon devolution, the rights of any governing person or body must be entirely determined by its will, as declared, tacitly or explicitly, at the time of such devolution (52); and Wolff is thus able to assume, as an obvious truth, that constitutional limitations may be imposed on a political authority, and that a constitution may be

* The gist of this paragraph is that democratic ideas survived, or were enunciated afresh, in the German theory of the first half of the eighteenth century. This is illustrated by (1) advocacy of the rights of Estates, (2) Leibniz's theory of sovereignty as relative, (3) the tendency of some of the followers of Pufendorf to admit the idea that the People is a personality side by side with the Ruler, and (4) the tendency of some writers to proclaim the idea of rights of the People, and therefore, if only by implication, to make the People a legal 'Subject' of constitutional rights side by side with the Ruler.

interpreted as a relation of contract between Ruler and People(53). Nettelbladt, following a similar line of thought, derives the whole of the system of internal public law from a contract made between the initially sovereign community and one or more 'Subjects' vested with ruling sovereignty or parts of it(54); and he admits that reservations or conditions may be freely imposed when the contract is being made(55) Only in the sphere of external affairs will he allow that the moral personality of the State is absorbed and contained in that of the Ruler(56): in the field of internal affairs he holds that the People has always and everywhere its own separate moral personality(57); and he even supposes a third moral personality, beside those of Ruler and People, wherever a popular assembly is to be found(58). Hoffbauer expounds an exactly similar view(59), except that he limits the hypothesis that an assembly of Estates may have a personality of its own, distinct from that of the People, to cases in which the members of such an assembly are not bound by *mandats impératifs*(60). Even the writers who laid more emphasis on the sovereignty of the Ruler and the need of its being inviolable were now willing to accept, without any demur, the idea of the Constitutional State, in which Ruler and People stood to one another in the relation of parties to a contract. We find a theory of this sort, with all the consequences which it entails, in the writings of Daries(61), Achenwall(62), Scheidemantel(63), and A. L. von Schlozer(64), who are even ready to face the revolutionary consequences which must ensue in the event of a breach of the political contract(65).

In the course of this conflict between absolutist and constitutionalist tendencies, the controversy in regard to the real nature of the relation between Ruler and People came to be connected more and more closely with another controversy, which turned on the various forms that the 'Subject' of ruling authority itself might take. This latter controversy was concentrated on the one question, whether a mixed form of State was at all conceivable, and whether, if that were the case, such a form was objectionable, or admissible, or even ideal. But before we address ourselves to this question, we must pause to consider the attitude to the problem of State-personality which was adopted by the advocates of the renascent doctrine of Popular Sovereignty.

III. The theory of Popular Sovereignty

For a century past [i e. from 1641 onwards] the doctrine of the sovereignty of the People had remained a living force in England alone. But while the English advocates of that doctrine were eager in insisting that the People possessed the final authority in the State, and possessed it as an inalienable property which might be recovered at any moment, notwithstanding any positive law to the contrary, they never went to the length of breaking entirely with the idea of a contractual relation between People and Ruler; and they did not hesitate, therefore, to dissolve the single personality of the State (so far as such an idea was ever present to their minds) into a plurality of 'Subjects' of rights.* Sidney, for example, is concerned to prove the identity of the sovereign personality of the People with the Parliament which is its plenary representative (66); but he interprets the relation of People and Government, none the less, as a relation of contract (67)—though he also maintains that the presence of a contract can never deprive the People of its superior position, or take away its sovereign right of final decision in the event of a difference of opinion (68). Locke equally seeks to retain the idea of the contractual character of the constitution (69); and so far as he transcends it at all, it is only in his contention that the People possesses, in virtue of its inalienable sovereignty, a power of adjudicating finally upon the conduct of the other party to the contract, which makes the existence of all constitutional law depend, in the last resort, on the judgment of the community (70).

Rousseau was the first thinker to abolish every vestige of the idea of a contractual relation between People and Ruler. He began by assuming that a single contract of society (*pacte d'association*) contained the whole of the creative force which made the State (71); he then proceeded to argue that the social authority thus brought into being possessed perfect sovereignty after the pattern of the strictest absolutism—a sovereignty incapable of any alienation, any division, any representation, any limitation (72); and he concluded accordingly that it was impossible for the sovereign com-

* Gierke's contention is that English thinkers assume a single *persona civitatis* —the People (either *per se*, or as expressed in Parliament)—but then go on to assume a contract; and since a contract involves two *personae* at least to make it, they necessarily must end by assuming a plurality (or at any rate a duality) of *personae civitatis*, or, in other words, a plurality or duality of 'Subjects' of political rights.

munity, even if it wished, to vest any public authority in any other 'Subject' by way of contract, or to bind itself by contract to observe any limits upon itself(73) The erection of a government is merely a unilateral act of the sovereign: it is a free commission which can be freely revoked at discretion(74). The collective sovereign, when it makes its appearance as a civic assembly, is therefore above all law. The whole of the existing scheme of law collapses before it whenever it meets; it can make a new constitution to take the place of the old; and if it prefers to make no change, it must deliberately decide to confirm the old constitution in order to give it a new title to existence(75). As with the constitution, so with the government: any right to their position which its members may have acquired disappears in the presence of the sovereign, which at its discretion can either renew, or bestow elsewhere, such power of agency as it may have given(76) This is, in effect, the declaration of a permanent right of revolution, and a complete annihilation of the idea of the constitutional State Rousseau believes that he has purchased the perfect unity of the State's personality by paying this extravagant price(77). But since his idea of the personality of the State is simply a mechanical interpretation of the personality of the People, he is forced after all (as we have already observed) to introduce a further personality of the government into the body politic; and though he tries hard to conceal what has happened by degrading this second moral person to a subordinate position, he really fails, no less than other thinkers, to escape from a dualistic conception of the 'Subject' of political rights(78)

Rousseau's system of thought continued to be the foundation on which the whole revolutionary theory of the State achieved its further development It was inconceivable that the sovereignty of the People should be exalted to a higher point in that theory: on the contrary, it was inevitable that it should be curtailed, as soon as there was any return to the ground of actual reality. Any thinker who admitted the possibility of the representation of the People, or believed in the need of a governing authority which was in any degree stable and independent, was bound to modify Rousseau's views. He must necessarily approximate to the idea of the constitutional State; he must curtail the omnipotence of sovereignty in its actual operation, even if he represented it as free from any limitation in principle; he must recognise the 'bearers' of the constituted powers of government as 'Subjects' of political rights, concurrently with the popular community, even if he expressly

identified that community with the State itself(79). The theory of Fichte affords a good illustration of this compelling necessity. He was the purest exponent in German thought of the principle of popular sovereignty; but he also sought to find room for the idea of a constitutional law which was binding upon the People itself(80). The People, he holds, must necessarily devolve upon a government, whether monarchical or republican, an 'absolute positive right', which includes the ordinary course of legislation, jurisdiction and administration(81). It reserves, however, a constituent authority, together with a power of supervising the government and pronouncing on the legality of its actions(82). But if it wishes to exercise this reserved sovereignty, the People must again become the 'Community' (*Gemeinde*), in order that it may be able, in that capacity, to distinguish its will from the will of the supreme authority which it has constituted, and to revoke its declaration that the will of that authority is its own will(83)*. Here a difficulty emerges. A private individual cannot, and the government *will* not, summon the Community into being, and yet the Community must be a Community before it can declare itself such. Fichte meets the difficulty by supposing that 'the People is declared in advance, by the constitution, to be the Community in certain contingencies'(84). In small States, this emergence of the Community is made possible by a provision for periodic assemblies: in large States, it is achieved by the creation of a special authority, which has to establish the existence of a case of illegality, and to bring about, at the same time, the meeting of the Community. In large States, therefore, the People must choose special ephors,† and arm them with 'absolute negative power' in virtue of which they are able, by issuing an interdict that brings all the government of the State to a standstill, to introduce the deciding voice of the People itself, which thus re-enters upon its sovereignty(85). The decisions then made by the Community thus brought into being are 'constitutional law'(86). If, however, in spite of all the securi-

* The Community is prior to the People; and it only becomes a People when it constitutes a State, in which we may henceforth speak of People and Government. This People, however, must reconstitute itself back into a Community, if it desires (1) to alter the act which constituted the State (i.e. the constitution), or (2) to judge the legality of the acts of the Government (i.e to pronounce whether they are in accordance with the constitution).

† The idea of the Ephorate, borrowed from Sparta, goes back to Calvin, and appears in the *Vindiciae Contra Tyrannos* and in Althusius: see E. Barker, *Church, State and Study*, p. 84.

ties which Fichte attempts to provide against such a contingency, the executive authority and the Ephorate should combine against the People, there is still in reserve the legal method of popular revolt for the purpose of giving effect to the real common will (87).

Fichte attempts in this way to construct a constitutional State, in which the People is sovereign, but the supreme authorities are none the less owners of rights secured to them under a contract [i.e. the contract by which the People devolves an 'absolute positive right' upon the government] (88). But while he makes this division between People and Government, Fichte still seeks to preserve the idea of a single 'Subject' of political rights; and he does so by dissolving the People into a mere 'aggregate of individual subjects' so long as the Government continues to act constitutionally (89), and, conversely, by making the magistrates relapse into the position of mere private persons as soon as the People again becomes a 'Community' (90) The personality of the State is thus made to appear at one given point at each given moment; but a personality which is now here and now there, and which alternates somehow between People and Government, is a personality which has lost any substantive or continuous existence of its own. We are hardly astonished to find that any idea of the personality of the Group-being vanishes utterly from Fichte's philosophy in the later phase of his thought, when he abandons the principle of the actual sovereignty of the People (91).

Meanwhile [in the course of the eighteenth century] the theory of *constitutionalism* had also adopted the doctrine of popular sovereignty as its basis. This was due to the influence of Montesquieu. When he gave to the theory of constitutionalism the form which was to prove decisive for the thought of the Continent, he incorporated in it the idea, which he had borrowed from English thinkers, that supreme authority belongs in its nature to the associated community (92). But the principle of popular sovereignty never played any serious part in the theory of constitutionalism. It only served, as a rule, to satisfy a need which was felt by different thinkers with different degrees of acuteness. It enabled them to find, at any rate in the abstract, some single basic authority underlying the 'division of powers' which seemed to disintegrate the unity of the State; it provided a sort of primary 'Subject', over and above the secondary 'Subjects' who exercised the several 'powers' in co-ordination with one another. This explains why Montesquieu himself fails to draw any practical conclusions from his recognition of the basic

rights of the community, and why, so far from doing so, he entirely omits the conception of the unity of sovereignty (just as he omits the conception of the personality of the State as a whole) from the picture which he draws of the constitutional State(93). In many writers [of the constitutionalist school] the theoretical acceptance of popular sovereignty only produces a crop of political maxims, in lieu of any real juristic interpretation(94). Justi, attempting to reconcile the theory of constitutionalism with the unity of power and will demanded by the idea of the body politic, lays more emphasis than the rest of the constitutionalists on the indefeasible 'fundamental authority of the People'(95); but he is prepared, none the less, to divide the personality of the State, and indeed to divide it twice over. Not only does he make the 'supreme executive power', when once it has been erected, stand over against the People as a separate contracting party(96); he also suggests a division of this authority itself among a number of different 'Subjects'(97). In the theory of Kant, the principle of popular sovereignty is still retained, in its full integrity, as a theoretical basis(98), but it is transformed for practical purposes into a mere 'idea of the reason' [or logical presupposition]. As such, it ought to guide the possessor of political authority(99), but it involves no diminution of the formal rights inherent in a sovereignty of the Ruler which finds its justification [not in this 'idea' of the sovereignty of the People, but] in the fact of historical growth(100). Kant sketches, indeed, an ideal constitutional State in which popular sovereignty is nominally present; but no living 'Subject' of supreme authority is anywhere really to be found in this State The 'bearers' of the different powers [legislative, executive and judicial] are supposed to govern, but each is subject to a strict legal obligation appropriate to its own sphere(101); and over them all, as the Sovereign proper, the abstract Law of Reason is finally enthroned(102)

The history of the theory of constitutionalism shows how a doctrine derived from the principle of popular sovereignty could produce almost the same results as the other [and apparently opposite] system of thought which started from the principle of the sovereignty of the Ruler. In the one case, just as in the other, the inviolability of sovereignty, and the unity of the personality of the State, are sacrificed, in order to attain the possibility of a constitutional law which is binding even on the Sovereign. In either case, the hotly disputed issue of the possibility of a mixed form of State becomes the centre of the whole argument.

IV. The theory of the Mixed Constitution

Whether such a mixed form of State should be recognised, side by side with the three simple forms, was a question which had been constantly in debate from the Middle Ages onwards(103).

When the point of view adopted was that of the sovereignty of the Ruler, and when the conception of such sovereignty was pressed to its logical issue, the answer was inevitably in the negative. If, on the one hand, a mixed constitution was understood to mean the division of Ruling authority among a number of 'Subjects' if, on the other, indivisibility was reckoned as one of the essential attributes of sovereignty; and if, finally, Ruling authority was held to be identical with sovereignty—then, and upon these conditions, it was impossible to admit that such a mixed form could exist. But what, in that case, was the position to be assigned to existing constitutions, the actual fruits of historical development, which did not square with the logic of an exclusive sovereignty resident in a single person or a single body of persons? Some thinkers tried to answer the question by pointing to the possibility of a simple limitation of the supreme authority(104), or by attempting, in a way which went more to the root of the matter, to reduce the conception of the mixed constitution(*forma mixta*) to that of the moderate or limited (*forma temperata*)(105). But the more exactly the *amount* of the limitations compatible with sovereignty was defined, the more was such an expedient bound to prove itself ineffective. If, on the other hand, limited sovereignty was regarded as an impossible contradiction in terms, the opposite course had to be followed; and [instead of the mixed constitution being placed under the head of moderate or limited constitutions] any State in which the power of the Ruler was constitutionally limited had to be reckoned under the head of mixed States(106). [This was, in effect, to dismiss such a State to limbo.] But it was hardly possible, and least of all was it possible in Germany, that any success should long attend the violent methods of the thoroughgoing absolutists who simply abolished with a stroke of the pen, or treated as of no account, any constitution which contradicted their scheme of political theory.

So it was that the doctrine of Pufendorf won its way to general acceptance According to that doctrine, division of powers is indeed a fact, but a fact which is only the basis of a monstrous and irregular form of State, and not of a *forma mixta* comparable

to the simple and unmixed forms. The very essence of the State is contradicted by any institution which vests several persons, or assemblies of persons, with independent rights of participating in political authority. 'Majesty', like the mind, is *unum et individuum*; and you can only distinguish its 'parts' in the same sense in which, when you are dealing with the mind, you distinguish the mental faculties. If, none the less, a division of majesty actually occurs, it is simply a case of a *respublica irregularis*; and a State of that kind is a diseased or 'perverted' State, like the perverted form of State described by Aristotle, with the one difference that the seat of the disease is here to be sought in the constitution itself, and not in the government only (107). The doctrine of the master was adopted, on this point as on others, by a number of his successors—among them Thomasius (108), J H. Boehmer (109), Hert (110), Schmier (111), Gundling (112), Heineccius (113), and Heincke (114). In time, however, this idea of irregularity came to be modified. It was argued that 'irregularity' only signified a deviation from the strict academic pattern, and did not prevent the recognition of mixed constitutions as systems which might, under certain conditions, be active and even appropriate (115). Otto declares in so many words that *irregularitas* due to a *forma mixta* is not an evil, and that, in Germany for example, it is '*ad genium populi accommodata*' (116). Titius, again, on the ground that no inviolable rules are prescribed for the form of the State either by nature itself or by the *consensus gentium*, seeks to eliminate altogether the distinction of regular and irregular forms in favour of a distinction between *respublicae adstrictae* and *laxae* (117).

We find another school of thinkers attempting to reconcile the conception of the mixed form of State, under one designation or another, with the requirements of the conception of sovereignty, by the method of abandoning the idea of divided sovereignty in favour of the idea of an *undivided participation* in 'majesty' by a number of 'Subjects'. A view of this nature had already been suggested by Besold; and it gradually won a general acceptance, especially in regard to the application of the theory of the mixed constitution to Germany (118). We may notice particularly the serious attempt which is made by Huber to interpret the constitutional State, by the aid of this idea of undivided partnership, without sacrificing the unity of political authority. He regards any real *forma mixta* as inconceivable; the State, which is one body and one mind, cannot be the residence of a *triplex majestas*. On

the other hand it is quite conceivable that several 'Subjects', and more especially a King and People or a King and Senate, should enjoy majesty in common (*communicative* or *simul*). Along with forms of the State in which majesty is only limited there may thus exist others in which it is *common*; and among the latter we may again distinguish between a complete *communicatio majestatis* (such as may be seen in Germany, Poland and Venice, where it is the basis of a formal *societas imperii*), and a mere *communicatio quorundam jurium majestatis*, which leaves the Ruler in possession of a *potestas summa, sed non integra* (119).

There were other writers who made similar attempts to preserve the conception of the mixed form of State while rejecting the doctrine of division of powers (120) It is obvious, however, that methods such as these could only have really secured the unity of the 'Subject' of political rights if the different 'Subjects' thus conceived as possessing rights in common had either been raised to the power of a new moral person, or depressed to the position of mere representatives of a State-personality which stood apart from and above them all Neither of these courses was followed; and the 'Subject' of political authority thus remained divided and disintegrated But if there were thus several 'Subjects' of sovereignty, it necessarily followed, however intimate the community of their relation with one another might be held to be, that *each* of them must somehow be allowed, at the very least, an 'unlimited share' in sovereignty* (121) [The facts of actual politics favoured such a conclusion.] If close attention were paid to the actual structure of mixed constitutions, and if the heterogeneity of the functions assigned to the several joint-possessors of sovereignty were taken into account—indeed, if regard were merely had to the way in which territorial sovereignty in Germany had definitely split away from imperial authority—it became impossible to deny the existence of an actual division of sovereignty, at least in regard to some part of the essential rights it involved (122) The result was a gradual process of reversion to the idea of divided sovereignty; and such reversion was not really postponed by the introduction

* An unlimited share is a share which is not limited to a part, but is a share in the whole (cf 'unlimited liability') Gierke's argument is that the theory of undivided partnership in sovereignty breaks down. There has to be a division of partnership into shares, with each partner taking his share. True, the shares of sovereignty may not be separate or discrete blocks of rights. They may only be non-separate and non-discrete shares in the whole system of rights But that much, at the very least, they have to be.

of a theory which suggested that the various part-sovereigns, though each independent in his own sphere, only possessed a full and entire sovereignty when they acted in conjunction. This theory is expressed most clearly in Achenwall; '*In Republica mixta dantur plures personae, seu singulares seu morales, quarum cuilibet competit certa pars imperii, vel qua propria vel qua communis, independenter a reliquis; hinc plures singuli vel corpora, qui sibi invicem sunt aequales et liberi quoad partem imperii cuique competentem. Quamobrem in Republica mixta illi, inter quos divisum est imperium, non nisi junctim habent imperium plenum et absolutum*'(123).

We can now understand why, in spite of all the attacks delivered against it, the traditional theory still survived that the mixed constitution was simply a clear case of divided sovereignty(124). The objection that this meant the disintegration of the State might sometimes be met by the answer that the State itself remained, after all, the permanent 'Subject' of all sovereignty(125); but this plea of 'the Sovereignty of the State' could bear no fruit, and produce no result, so long as sovereignty itself continued to be treated as an object divided among a number of different ruling 'Subjects'. Nor was a more satisfactory solution to be found in the distinction between the 'substance' and the 'exercise' of majesty, which Leibniz made the basis of his theory(126).

But the theory of the mixed constitution began to acquire a wholly new vigour when the doctrine of constitutionalism associated it with the principle of a *qualitative division of powers.** When political power began to be differentiated into a number of different powers which were distinguished from one another by their own essential character, it became possible to hold that a system which assigned these different powers to a number of differently constituted 'Subjects' was so far from being prejudicial to the interests of the State, that it might even be regarded as indispensable to its true perfection. As the English constitution gradually came to be considered the ideal, it thus began to be celebrated, from the days of Locke onwards, not only for the merits which it derived from its supposed mixture of the three simple forms of State [monarchy, aristocracy, and democracy], but also

* From this point of view the doctrine of constitutionalism required a mixed State to exhibit a division, not so much between different *quantities* of power divided among different sets of persons, as between different qualities or kinds of power—the executive, the legislative, the judicial—divided according to their *quality* among different authorities appropriate to their special requirements

for the clear separation of the different powers which was consequent upon and determined by this mixture(127). Montesquieu openly declared that the union of the three powers in a single 'Subject' was the grave of political liberty, their separation from one another its guarantee, and their division among different authorities its proper canon and test(128); and it was because division of powers was most perfectly attainable in the mixed constitution that he assigned this form a pre-eminence over the simple forms(129)

When the theory of division of powers proceeded on the assumption of the sovereignty of the People, its adherents could meet the reproach that they destroyed the indivisibility of sovereignty with the reply that sovereignty itself [as distinct from the various 'powers'] remained undivided in the hands of the People. But the more the doctrine of constitutionalism was pushed to its logical conclusions, the less was it possible for it to invoke the sovereignty of the People. On the strict logic of that doctrine, the permanent sovereignty of the community was supposed to find its one and only expression in the legislative power, and this power was held to be exercised [not by the community, but] by its representatives; moreover, it was supposed to be only one among a number of powers which were all equally independent(130). We can trace the consequent reaction in Rousseau's attempt to prove the genuine and unimpaired sovereignty of the People. He has, it is true, no objection to a mixed constitution, in the sense of a composite structure of the governing body [a body distinct from the *État*, or sovereign people](132) After all, on his principles, the distinction between different forms of constitution is a little thing, a mere secondary distinction between different forms of *gouvernement*(131).* But he attacks the doctrine of a division of powers [in the State itself] with all his power: it is, he argues, an intolerable dismemberment of indivisible sovereignty(133). And yet, if we regard the substance of his thought rather than the form in which it is expressed, we cannot deny that Rousseau himself is not entirely averse from the principle of the division of powers. Not only does he separate the legislative power as clearly as possible from the executive: he also advocates the exercise of the two separate powers by two different moral persons(134). He even goes to the length of refusing to allow to the People, as such, any capacity for under-

* The change in the order of the notes, here and elsewhere, is due to a change, in the translation, of the order of the sentences in Gierke's text.

taking an act of government: if it is ever called upon to do so, it must turn itself, in order to act, into a governing body, by the aid of a transformation which is little short of a miracle(135). Rousseau may emphasise as much as he likes the principle that legislation alone is really sovereignty, and that every other function of the State is a subordinate form of service; but he fails entirely, none the less, to prevent [executive] government from assuming the character of genuine political authority, or the governing body from acquiring the status of a 'Subject' of political rights(136). The advocates of the radical theory of popular sovereignty after his time came even closer than he did himself to the idea of a real and essential division of powers(137).

If radicalism could thus combine division of powers with popular sovereignty, the growing school of constitutionalism showed itself still more ready to succumb to the theory of Montesquieu, which combined the postulate of division of powers with the conception of the mixed form of State(138). From the middle of the eighteenth century onwards the exponents of the natural-law theory of the State, even when they still continued to profess a belief in the sovereignty of the Ruler, were seldom or ever averse from recognising a mixed form of State, with sovereignty divided, in one way or another, among a number of different 'Subjects'(139). In Germany, as elsewhere, the mixed constitution was gradually elevated to the dignity of a political ideal(140). It was advocated with especial ardour by Justi(141) and A L. von Schlozer(142); and its vogue culminates in the theory of Kant, which derives division of powers directly from the rules of logic, and treats such division as an inviolable precept of the law of reason for every legitimate and really authentic State(143).

V. The contributions made by the natural-law theory of the State to the development of public law

This was the end of the natural-law theory of the State. Supporting the cause of the constitutional State, it ended, so far as its conception of sovereignty was concerned, in what was almost unconcealed bankruptcy; it ended, so far as the idea of the unity of the State-personality was concerned, in absolute disintegration. Not until the whole of the individualistic theory of the State evolved by the School of Natural Law had been transcended, and the

conception of a living Group-being had been elaborated by a school of thought which followed the organic idea of historical evolution, was it possible to restore the idea of a sovereign State-personality.

Yet the School of Natural Law had rendered a real service. It had refined the idea of the unity of the body politic into that of a single *persona moralis*, and in doing so it had shed a definite and lasting light on a number of problems in public law which were capable of solution by a *formal* and technical conception of personality.

(*a*) The principle that a moral person was a unity, which continued to exist through all the changes of its parts, produced, or helped to produce, a theory of the continuity of public rights and duties; and it began to be generally assumed that the State remained the same identical 'Subject' of rights not only when there was a change of persons or territory, but also when there was an alteration in the form of the government(144). A further consequence followed. In cases of the division of an existing State, or the union of several existing States (such cases being held to involve merely 'alterations' of the political situation, as distinct from the complete extinction of a State), rules were laid down which secured the transference of the rights and duties of the old 'Subject' of rights to the new 'Subject' which had taken its place(145).

(*b*) The conception of the Ruler as Representative of the personality of the State was also useful A clear distinction could thus be made between the Ruler as a 'Subject' of rights in his representative capacity, and the Ruler as a 'Subject' of rights in his private character. Where an assembly was recognised as Ruler (or as Joint-ruler), the natural-law conception of the *persona moralis* was applied to it; and the members of such an assembly who enjoyed the right of representing the State (or of joining in its representation) were held to do so as a Collective unity, and not as individuals. The rules of the law of corporations could thus be applied to the activities of the will of this representative Collective person, and they could be made thereby to regulate the willing and acting of the State itself(146). Even more important consequences could be drawn [from the conception of the Ruler as Representative of the personality of the State] where a single person was the bearer of Ruling authority. Here an identity was allowed to exist, either wholly or partially, between the representative *persona physica* of this individual and the personality of

the State; but two rôles or persons were distinguished within the *persona physica*—that of the Ruler, and that of the private individual (147). This distinction produced a number of consequences. It produced a separation in principle between the sphere of the King in public law, and his sphere in private law (148). It produced a separation between acts of government which were done by the Ruler as Ruler, and were therefore done by the State through him, and his private acts (149). It also supplied a principle which could be applied to acts done by officials in the discharge of their official duties; for though use was made of the private-law categories of *mandatum* and *ratihabitio** in order to explain the validity of such acts, it was also possible to take the ground that officials represented the Ruler as such—i. e. in his public, as distinct from his private capacity—and to argue accordingly that their acts were really acts of the State itself (150). Again the distinction between the person of the Ruler and that of the private individual automatically supplied the true principle for solving the old and vexed question, whether the successor was bound by the acts of his predecessor (151); though it must be admitted that there was always a tendency to confuse the issue again by introducing principles drawn from the private law of inheritance (152). Even the unlawful dictator ruling during an interregnum was gradually recognised as possessing, to some extent, a right of representing the personality of the State, which enabled him to bind the citizens by his acts (154); but the theory of Natural Law generally insisted on the need of legitimation of his *de facto* position by a subsequent act of confirmation (153).

(*c*) But it was in their treatment of State-property that the natural-law theorists developed their conception of the personality of the State furthest (155). They drew a distinction in principle between State-property and the property of the Ruler: they ascribed the ownership of State-property to the State itself, and vested the Ruler with nothing but a right of administration: they required the revenues accruing from the property of the State to be applied to public objects, and they made the alienation of such property depend on the consent of the People (156). There was, it is true, a great deal of difference of opinion in regard to the classification of the different elements included under the head of State-property (157). The demesne of the territorial prince offered a peculiar problem, and there were some thinkers who failed to

* *Mandatum* is an authorisation of the action of an agent in advance *Ratihabitio* is a term used to signify a subsequent confirmation.

classify it precisely (158); but with the passage of time even demesne came to be included, without any qualification, in the general conception of State-property (159).

An increasing precision was also given to the distinction between the private-law right of the State to own particular objects and its public-law right of government over the whole of its political territory* (160). We must admit, it is true, that it was the theorists of Natural Law who developed an intermediate idea—that of the *dominium eminens* of the State, in the sense of its supreme or final ownership of everything; and it was they who applied that idea to justify the interference of the State with private property, especially in the way of confiscation and taxation (161). But while we make this admission, we must also note the gradual growth of another view of the matter, which was opposed in principle to including the conception of property at all in the area of the political rights of government (162)

CHAPTER II· SECTION I, §18

THE THEORY OF CORPORATIONS IN NATURAL LAW

I. ASSOCIATIONS CONTAINED IN THE STATE

The natural-law theory of society included its own particular theory of associations (*die engeren Verbande*); and this theory asserted itself with a growing independence, and with increasing success, against the traditional theory of Corporations to be found in positive law. The basis of this natural-law theory of corporate bodies was common to all thinkers; but the results produced by different thinkers differed, and differed widely, according as 'centralist' or 'federalist' tendencies were allowed to dominate thought.

* The story of the emperor Frederick I and the two jurists Bulgarus and Martinus is to the point. On a ride together they discussed the question whether the emperor had only *imperium*, or whether he had also *dominium*, over his territories At the end of the ride the jurist who contended that he had both of these rights received the present of a horse. The other consoled himself by remarking, *Amisi equum, quia dixi aequum.*

(1) *Divergence of centralist and federalist views*

There was a difference, to begin with, between the different systems or schools in regard to the proper grading of associations on the principles of Natural Law. It is true that all corporate bodies alike were in some degree or another brought under the rules of Natural Law by all the different schools. As they were all included under the generic conception of *societas*, they must necessarily all have their place in the general scheme which had been elaborated for all 'societies', and which usually formed the preface to every account of the general natural-law theory of society. But this still left open the question whether, and if so, to what extent, the existence of intermediate corporate bodies between the Individual and the State was an integral part of the natural order of society, or an optional and arbitrary institution of positive law.*

(*a*) The balance of opinion inclined to the centralist view, which at most would admit only the Family—and not the local community (*Gemeinde*) or the Fellowship (*Genossenschaft*)—to a separate and distinctive position in the natural-law grading of associations. The majority of the natural-law theorists contined to follow the scheme of Aristotle, and in constructing a hierarchy of natural-law groups they accordingly made the State, regarded as a *societas perfecta* or *sibi sufficiens*, follow immediately upon the Family, with its three *societates simplices*† and its *societas composita* (the Household) formed by the union of the three(1) True, the local community [the 'village' of Aristotle] was treated in this connection as a stage on the road to the State; but in the State itself, when once it had come into existence, this community was only allowed the significance of a constituent part or division(2) The Fellowship, as a *societas arbitraria*, was banished altogether from the category of natural groups(3). The result was that the rights of corporate bodies (if we leave out of account the background of natural-law principles which was involved in the inclusion of such bodies under the general head of *societas*) were treated as merely a part of the

* Briefly the argument is that all the shades of natural-law theory agreed that Natural Law *applied* to all associations, but they were not all agreed that all associations had been *produced* by Natural Law. They were thus led to differ about the grading of associations—some saying that all associations were natural, others arguing that some associations, at any rate, were artificial in origin.

† That of husband and wife, that of parent and child, and that of master and servant.

system of civil rights which the State first brought into being. If any closer examination of the question was attempted, it was generally in connection with the theory of the position of the subject (*Untertan*), and it only meant the addition of some account of subjects when acting as groups to the general account already given of the position of individual subjects(4).

The centralist tendency in the natural-law theory of society was strongly accentuated in the theories which, following the lead of Hobbes, identified the formation of human society with the creation of the State, and supposed it to be achieved by previously isolated individuals through the conclusion of a single contract. On this basis it became impossible to regard any intermediate groups, of any description, as natural 'group-steps' standing between the Individual and the State [and leading up from the one to the other]. They could only be secondary formations which had come into existence within the State, and after it had been created. The natural-law system, as we find it in Spinoza, Rousseau, Justi, Fichte, Kant and many other writers, knows only the Individual and the State.

(*b*) In Germany, on the other hand, there was never entirely extinguished what we may call a 'federalist' point of view. Under its influence, thinkers were able to regard the Fellowship and the local community as natural group-steps in the process of political evolution, with a life and purpose of their own; and they could hold that these intermediate groups, even in a fully constituted civil society, had their own inherent existence, which was based upon, as it was also secured by, Natural Law. No exposition of this line of thought which was as bold or as logical as that of Althusius was ever attempted again; but the idea of a natural articulation of human society in a series of ascending grades remained active in more than one quarter(5), and Leibniz gave it a new and vigorous life(6). We may also notice another expression of this federal tendency. The more thoroughly the general natural-law theory of 'societies' was elaborated, the more inevitably was it impelled towards the idea that by Natural Law the Corporation and the State stood on a footing of equality(7). The most perfect expression of this tendency is to be found in the theory of Nettelbladt, which exercised a considerable influence He made a radical distinction, both in natural and in positive law, between the rights of the individual and social rights Basing the latter entirely on the one conception of a contract of society, he interpreted the whole world

of human groups—in all its ascending series of Family, Fellowship, local community, Church and State—according to a scheme which was common to the whole series, and yet left room for a large diversity(8). But there were many other systems, besides that of Nettelbladt, in which the natural-law theory of society was developed, with various degrees of definition, along similar lines(9).

(2) *The relation of the Corporation to the State*

(*a*) *Views inimical to Corporations.*

These differences of opinion about the proper grading of associations on the principles of Natural Law were important for their bearing on the general theory of the relation between the Corporation and the State

If the corporative articulation of civil society was not derived from Natural Law, it must also be devoid of any sanction in Natural Law. It could only be a part of the system of positive law, which the State was free to determine by considerations of mere expediency. In that case local communities and Fellowships had no lot or part in those sacrosanct rights which, according to the theory of Natural Law, were derived immediately from the law of Reason, and were therefore above the reach of legislative discretion. Their 'person' was not, like that of the individual, inviolable by the State, and it was not invested with inherent rights. The obligation which they imposed on their members was not, like political obligation, a necessary and inevitable limitation of natural liberty. They were creations of historical law, but they had no rights under the Law of Nature.

In the age of Enlightenment,* the prestige of historical law increasingly paled before the splendour of the new ideal law; and the more it paled, the easier it was to advance from denying that corporations had a sanction in Natural Law to questioning whether they existed at all. Natural-law theory of this extreme order became a powerful ally of the practical policies which were directed to the destruction of the corporative system of Estates inherited from the Middle Ages. There were now two forces in the field—the State, with its passion for omnipotence: the Individual, with his desire for liberation. They had one thing in common, however hotly they might otherwise wage a frontier-war with one another. They could both use the weapons forged by the extremist

* The age of Frederick the Great, Voltaire and the Encyclopaedists.

natural-law theory to wage a joint battle against intermediate groups.

Even the most advanced of the absolutists did not, at first, demand the elimination of corporations· they only desired a strict limitation of their powers. The utility of a corporative articulation of civil society was not in dispute. But the whole structure of corporations, in their inner life and their external relations, was treated as a product of the State; and the State was urged to pursue a policy of asserting and using to the full its authority over them, in order to meet in advance the menace of group-formation and to remedy its existing abuses. Thus the legality of every association was made to depend on a government 'concession'(10): any meeting, including the regular meetings of members of recognised corporations, was supposed to require the permission of a higher authority(11), and all the more important activities of corporate life were made to involve the co-operation of the State(12). Where the positive law in force was contrary to the principles of Natural Law, there was no hesitation in assigning to the State a right to annul or remodel corporations on grounds of public welfare(13). In the same vein, the authors of constitutional Utopias in which the State was constructed on the basis of intermediate groups, instead of connecting their schemes with actual and historical corporations, attempted to secure a rational articulation of the body politic by a purely mechanical division of people and territory(14).

After the middle of the eighteenth century, and more particularly in France, the attack on the principle of corporate life was transformed into a regular war of annihilation. In 1757 Turgot formulated, in its extremest form, the idea which had been developed by the School of Natural Law, that 'moral bodies'—in contrast to individuals, who had rights which were sacred even for the whole community—had no rights at all as against the State(15). Rousseau, who held that the natural right of association had been exhausted and abolished in the act of concluding the political contract (*le pacte d'association*), rejected entirely any idea of the corporative articulation of the State, on the ground that it was a falsification of the general will(16); and he made it an object of policy that all separate societies in the State should be eliminated(17) Revolutionary theory afterwards never escaped from this circle of ideas. The actual policy of the Revolution itself, as is well known, went far towards the achievement of an atomistic ideal, for which the absolute monarchy of the *ancien régime* had already

prepared the way. In the execution of that policy the natural-law theories which were inimical to corporations played a leading part. They are to be heard, in every note of their whole gamut, during the famous debates of the French National Assembly on the confiscation of Church property(18). The older ideas of positive jurisprudence still found a vigorous expression, even in that body(19); but they were overwhelmed in the flood of natural-law arguments, some based on the idea that rights of corporations, in the sense of rights separate from those of the State, were simply non-existent(20), and others on the view that any possible right which a corporation might possess, being without sanction in Natural Law, was bound to disappear before the sovereign rights of the State(21).

After the ruin of the old historical associations, the problem of reconstruction began to appear. It was recognised that some sort of intermediate groups, midway between the State and the Individual, were after all indispensable; and here a new division of opinion emerged in the camp of Revolutionary theory itself. There were some who exalted the merits of decentralisation, as against an exaggerated policy of unity, and argued that there ought to be room for the separate life of the parts as well as for the life of the Whole. But the conception of corporations current in the old law of France was still anathema; and no conception of associations was really permitted which did not square with the general principle that any division of the body of the State should be made by the State itself, and made for reasons of State. It is significant that Sieyès, who had begun as the most uncompromising advocate of Rousseau's point of view(22), afterwards became a champion of the inviolability of corporate property(23), and ended as an enthusiast for a system of self-governing municipalities(24); but it is also significant that he always guarded himself against any suspicion of a desire to restore the old system of corporations(25). The mechanical and mathematical divisions of the State which he suggested as the vehicles of communal life had indeed very little in common with the old corporations.

In Germany, as well as in France, the entry of Rousseau's ideas was accompanied by his spirit of hostility to the principle of corporate life. It is true that there was hardly a single writer of any repute who went to the length of advocating the complete elimination of intermediate groups. But from the middle of the eighteenth century onwards we find the adherents of the pure law of Reason denying that associations possessed an inherent right of existence,

and advocating a view of their origin which made them entirely State-institutions (*Staatsanstalten*). Justi includes no corporative elements in his scheme of civil society(26). Scheidemantel attaches great importance to the 'societies' (*Gesellschaften*) in the State; but he denies altogether the principles of liberty of association and the right of meeting(27), and he subjects even authorised societies to permanent State supervision(28). He holds that a society can have rights and responsibilities of its own, so long as it remains within the four corners of the law; but in order that these rights and responsibilities may be kept in harmony with the aim of the State, he makes them depend on its influence and control to a degree which gives them a definitely permissive character, of the nature of a *precarium*(29), and not content with depriving associations of any sort of autonomy under public law(30), he would even place their property at the disposition of the State(31). He distinguishes public and private societies; but his general treatment of the various species of lawful societies shows a tendency to regard the State-institution as the ideal to which societies should as far as possible conform(32).

Fichte banishes the conception of the Corporation entirely, in favour of that of the State-institution(33) Kant's attitude to the old and historical rights of corporations shows a lack not only of sympathy, but also of understanding; and he does less justice to the importance of associations than any of his contemporaries He begins by directing his attention exclusively to the institutional element in all permanent forms of union; and he accordingly puts the 'Corporation' and the 'perpetual Foundation' (*Stiftung*) on the same basis(34). Holding this conception of moral bodies, he denies that they have any right to independent existence; and he holds that the State has the right, at any time that it thinks proper, to annul them, and to confiscate their property on payment of compensation to their surviving members He goes even further. Arguing that the appropriation of land to the exclusive use of subsequent generations, who succeed to it under particular rules to that effect, is invalid, and contending that any title to corporate possession hitherto existing has now lapsed with the change of public opinion, he refuses to recognise that the property of moral bodies is property at all. It is only a right of temporary usufruct; and thus the confiscation of corporate property by the State is only the removal of a 'supposed' or 'assumed' right(35). Nor is it merely as a matter of theory that Kant claims this competence for

the State. He obviously regards the dissolution of moral bodies as an actual and practical postulate of the law of Reason; and he is convinced that, in this as in all other cases, the law of Reason should break with the law of History, and should burst the bonds laid by the past on the present(36).

(*b*) *Views favourable to Corporations:*
especially in the theory of Nettelbladt.

If Natural Law thus supplied the driving ideas to a movement which was ultimately directed towards the engulfing of corporations in the State, we must not overlook the fact that other and different ideas also continued to flourish in natural-law social theory, and that the growth of such ideas served to prepare the way for a restoration of the liberty of corporations in a rejuvenated form.

To pursue the theory of a contract of society to its logical conclusions was necessarily also to arrive, as we have already had reason to notice, at the idea that associations had a natural right to exist independently of State-creation. As a *societas*, each corporate body was the result of contract; and all such bodies derived their existence, exactly in the same way as the State, from the original rights of individuals which formed the basis of contract. The State might forbid its subjects, wholly or partially, to form separate societies, but if and so far as it refrained from doing so, individuals were only making use of their natural liberty (and not employing a right which had first to be conferred by the State) when they associated with one another to attain common ends by common means. Positive law might limit corporations ever so strictly; but it could not destroy the sap of vitality which they drew from their roots in Natural Law, and it could not but leave them, to a greater or less degree, in possession of inherent rights of their own, even against the State itself.

Ideas such as these were assumed as axiomatic even by writers who were among the protagonists in the struggle against the independence of corporations. Hobbes himself had shown the way in this direction, by propounding the doctrine that the contract of society, though it could never produce a new *authority* after the State had once been erected, could still produce new *forms of association*. Pufendorf followed Hobbes closely in this respect. When he comes to treat of the *vincula peculiaria* which serve in most States to bind citizens together, over and above the general bond of

political obligation, he first directs his attention to the *peculiaria corpora civitati subdita* (37). Among these bodies he treats the Family, and the Family only, as prior to the State; and he therefore holds that the Family has retained the right to everything which has not been specifically taken from it. The other associations are posterior to the State; and they fall into two subdivisions—*publica*, or those founded by the sovereign authority itself; and *privata*, or those which owe their existence to a contract (*ipsorum civium conventio*) or to some external authority. Private associations can only become *corpora legitima* with the consent of the State (38). Whatever right or authority they exercise over their own members depends entirely on the assent of the sovereign authority, and can never acquire an independent title as against that authority (*quicquid juris habeant et quicquid potestatis in sua membra, id omne a summa potestate definiri, et nequaquam huic posse opponi aut prevalere*). Otherwise there would be a State within a State (*alias enim, si daretur corpus limitationi summi imperii civilis non obnoxium, daretur civitas in civitate*) (39). The conclusions which Pufendorf draws from this subordinate position of corporations, especially in regard to the limits of the representative authority of their assemblies and officers, are similar to those of Hobbes (40). Otherwise, and apart from this limitation, he regards it as a characteristic inherent in the organic nature of the State that the body politic should be constituted by members which are also bodies themselves (41)

After Pufendorf, the distinction between *societates aequales* and *inaequales* begins to be used with a view to attaining conclusions similar to those which he had drawn (42). The equal society is defined as a society without social authority; unequal societies (with the exception of family groups under a paternal authority) are regarded as societies which can only be constituted by a political group with a Ruling authority [i e the State]; and the principle is thus attained that though a corporation may *exist* as an equal society in its own right, it can only possess any *authority*, of any kind, in the form of a fragment of State-authority with which it has been entrusted. Hert may be reckoned among the first who used the antithesis of *societas aequatoria* and *societas rectoria*, with a clear sense of its implications, to explain the relation between the Corporation and the State. He holds that the contract of society is capable of producing a body which is constant through all the changes of its members, and possesses a single personality; but he hastens to add that such a body can never have a 'mind' (*Seele*),

and thereby a capacity for will and action, until there has been instituted a supreme authority [which can give it such a mind and capacity]. Now the only example of such an authority is the political sovereign of the State, who has been instituted by means of the original contract of subjection; and the *universitas* must therefore be content to receive any organised form of authority which it possesses at the hands of that sovereign, and as a part of the State (43).

J. H. Boehmer erected this new doctrine of corporations into a formal system (44). He admits that liberty of association, which existed in the state of nature as an effect of natural liberty, has never been utterly extinguished in civil society; but he holds that it has been limited, and that in two ways. In the first place, *collegia* can now only be formed as *societates aequales*: they cannot, therefore, create an *imperium*· at the most they appoint a manager. If an association could create its own government, there would be a State within a State. A *collegium*, in its capacity of a moral person, is therefore subject to the authority of the State, and subject in the same way as its own individual members. In the second place [besides being subject in the same way], it is subject to an even greater degree. Where an association is concerned, a still stricter use of political control is necessary, proportionate to the greater power and the more serious menace presented by such a new person, composed of a number of individuals, when compared with ordinary individuals. On both of these grounds Boehmer would vest the State with a power over corporations sweeping enough to leave hardly a trace of the liberty of corporations which he has begun by admitting in principle He argues that the bearer of political authority has to take proper measures, in his general policy, to prevent corporations from assuming an authority of their own, and thus becoming small States, or causing injury to the State in any other way. Moreover, the Ruler has also a number of rights of detail. He has a right, in the first place, to prohibit particular *collegia* at his discretion, and to deprive them thereby of the *jura personae civilis* (45) He can also issue an ordinance in advance, as was done in Roman law, proclaiming that no *collegium* will be tolerated in the State which has not been expressly sanctioned; and he is further entitled to create *collegia et societates* himself, as he may think fit, and in doing so to regulate their government, constitution and powers. The *collegia publica* he thus creates will henceforth be totally dependent on the authority of the State. More especially, they will be strictly limited in the management of property, since,

whatever they possess, *auctoritate publica possident*(46); and the sovereign may even compel his subjects to become members, and to share in the burdens, of such bodies. Finally, he must also exercise a constant supervision of *collegia privata* (particularly the guilds, with their *monopolia et mores pessimi*), in order to prevent their taking any decision which is detrimental to the State; and he may also prescribe in advance definite limits to their action.

On such a view there can be no question of any independence of associations The way is barred in both directions. Suppose, on the one hand, that a real and effective social authority is recognised as belonging to a local community or a Fellowship. In that case such authority cannot be exercised as an inherent right, because authority is excluded from the idea of *societas aequalis* [which is the idea constituting these bodies]; and it must therefore be exercised in the name and under the commission of the sovereign, as part and parcel of the authority of the State. Suppose, on the other hand, that a corporation acts in its own inherent right. In that case there is only a contractual obligation of the members [to accept its authority] and nothing more, and even so the State is still entitled to avail itself of its suzerainty over corporations to interfere and impose limits on their action, or to reserve the right of previous assent * True to the logic of his ideas, Boehmer rejects altogether any idea of corporations legislating(47), or judging(48), or administering(49) for themselves. He even refuses to allow the validity of the conception of corporate office(50). If we add to this the defenceless position in which he leaves any privilege granted to corporations(51), and the strong inclination which he shows to hand over their property to the State(52), we cannot escape the impression that Boehmer has travelled from one pole to the opposite. Basing himself in theory on the idea of the liberty of associations, he comes to a practical conclusion in favour of their absolute subjection.

When the antithesis between *societas aequalis* and *inaequalis* had been developed to such a point, it became possible to use a natural-law basis of argument as a lever for ejecting the law of corporations entirely from the sphere of public law, and removing it into the sphere of private law. If public law were defined as the system of rules relating to government, and if, again, associations were held

* Briefly—if an association exercises *real* authority, it does not do so in its own right; and if it exercises authority in its own right, it does not exercise *real* authority.

to be incapable of producing any government, it followed that public law was concerned with associations not as active 'Subjects', but as passive 'Objects', and only dealt with them in so far as it dealt with the rights of governing authority over them; and on this it followed in turn that the rights which belonged to corporate bodies must be merely rights at private law. This is the line of argument followed by J. H. Boehmer. He explains the distinction between *jus privatum* and *jus publicum* by the fact that in the *status civilis* all *actiones* are either *privatae* or *publicae*, and therefore need different *normae*. He then classifies as *actiones privatae* the acts of *cives ut singuli*, the acts of *singula corpora ut privati*, and the acts of the *Princeps qua privatus*; while he limits the category of *actiones publicae* to the acts of *cives qua membra Reipublicae* and the acts of the *Princeps qua talis* (53). Logically enough, on this basis, he can only find a place for the theory of associations, in his '*System of General Public Law*', under the heading of 'the State's control of corporations and churches' (54). Titius goes further still; and he never mentions local communities or Fellowships or Churches except in connection with private law (55). The distinction between public and private law generally continued to be drawn on similar lines by later writers (56).

From another point of view, we find the distinction between 'equal' and 'unequal' societies helping to provide a bridge of transition from the natural-law theory of the contract of society to the Roman-law theory of corporations It only needed a further development of the often expressed idea, that a group could not possess full personality until it acquired a representative Ruling authority, to bring the natural-law distinction of *societates aequales* and *inaequales* into line with the Roman-law distinction between *societas* and *universitas*; and when this had been done it became possible to argue that while the contract of society might produce a *societas*, or partnership, it was only the influence and action of a political authority that could explain the existence of a corporation, or *universitas*. This is the line followed by Huber, for example, when he develops the particular theory of *universitates* which forms part of his general theory of the State (57) He begins by describing the *universitas* as a body of persons, being neither a Family nor a State, who are united for the sake of a common advantage and provided with a definite system of government (*certus regiminis ordo*). He emphasises the element of *certum regimen* as the essential attribute which distinguishes a *universitas* from a *societas* (58); but he equally

makes it a reason for requiring that, before a *universitas* can come into being, the sanction of the State, from which it receives a government of its own, must first of all be obtained. Nor is he content with arguing that a corporation only becomes such in and by this act of the State. He proceeds to make the definite permission (or 'concession') of the State a necessary element in the idea of the *universitas* (which, incidentally, at once excludes the Family and the State from that category); and he accordingly includes the fact of such permission in the more precise definition which he finally gives (*coetus...sub certo regimine permissu summae potestatis ad utilitatem communem sociatus*) (59). In explaining the relation of the Corporation to the State, he applies throughout the two ideas (1) that a corporation can act in its own right only within the sphere which it has in common with a *societas*, and (2) that the organised authority, which distinguishes a corporation from a *societas*, can only be exercised by its bearers in the name of the sovereign, and by virtue of a commission given and defined by that sovereign (60) Huber's exposition of the subject is repeated, sometimes in his very words, by Schmier (61)—and this in spite of the fact that, in an earlier passage of his treatise, he expresses his agreement with Boehmer as regards the recognition to be given, and the limits to be assigned, to the rights of association which spring from 'natural liberty' (62) Statements which approximate to Huber's point of view are also to be found in other writers (63).

In general, however, the adherents of the School of Natural Law, far from following the line of thought which we have just described, departed further and further, as time went on, from the Roman-law conception of an essential difference between *societas* and *universitas*. In particular, the German thinkers who applied themselves to the systematic construction of a natural theory of society were so far from accepting that conception, that they directed their main effort to attaining a homogeneous conception of all forms of society, which would obliterate any line of division between partnership and corporation. This tended also to eliminate the artificial distinction which had hitherto been drawn between equal and unequal societies. Such a distinction lost its significance as soon as it came to be held that the very simplest form of society already contained the elements of which *all* groups were composed, up to and including the State. At any rate it ceased to oppose any further obstacle to the rise of a more liberal view, which would be ready at need to broaden the basis of the inherent rights

theoretically recognised as belonging to associations in relation to the State.

The actual development of the natural-law theory of society corresponded to what we are thus led to expect. The emphasis which they laid on the homogeneity of all societies really led many of the exponents of that theory to adopt a more favourable attitude to the idea of the independence of corporate bodies. The status which Leibniz assigns to local communities and Fellowships in the general hierarchy of groups depends entirely on the assumption that they possess an inherent social authority; and though he introduces the distinction between equal and unequal societies, his view remains unaffected by it (64). Wolff definitely lays it down that the contract of society produces of itself, in every society, an initial *imperium* of the body over its members (*jus universis competens in singulos*); and he reduces the distinction between the *societas aequalis* and the *societas inaequalis* to the simple fact that in the former *imperium* remains with the body itself, and in the latter it is delegated by it (65). On this basis the autonomy of the body, and its jurisdiction over its members, are both conceived as inherent rights, necessarily issuing in some degree from the nature of a society (66); and the control of the State over corporations is regarded as derived, not from the fact that the authority of a corporation comes from the State, but from the general power of supreme control which belongs to the sovereign (67) We find similar views in regard to the basis of the authority of corporations, and that of the control of the State over corporate bodies, expressed by S. Cocceji (68), Heineccius (69) and Daries (70).

But the greatest exponent of such views was Nettelbladt; and he developed them into a comprehensive system, in which the idea of the liberty of corporations finds full expression. He was the first thinker who drew from the old axiom, that social entities had a sanction in Natural Law, the new conclusion that all societies, like all individuals, had inherent natural rights. In his view the basis of the existence of a *societas* is the union of a number of men to form a moral person, for the purpose of attaining a common object which is not transitory, and not concerned solely with rights of property, by means of a social constitution (an *interna constitutio*, which serves as the *politia societatis*). Such a *consociatio* may, he believes, arise naturally, or it may be created by a 'third party'; but it may be also produced by the free will of the members, and

in that event the means by which it is achieved is a contract. In whatever way a society comes into being, it brings with it into the world certain rights of its own, so that henceforth we must distinguish within it between *jura personae moralis* and *jura singulorum*. Its own rights, being *jura socialia sive collegialia*, are derived *ex natura societatis*, and therefore *ponuntur posita societate*; but in societies (as also with individuals) original and inherent rights may receive an addition in the shape of acquired rights, or *jura societatis contracta*. The 'substance', or essence, of *jura socialia* is the *potestas societatis*. the 'exercise' of such rights is the *regimen societatis* Social authority (*potestas societatis*) can assume different forms in different kinds of societies· it may be *summa*, or it may be *subordinata*; and any original authority may also be further increased by the addition of acquired rights. In a voluntary *societas, quae sibi ipsi originem debet*, the primary 'Subject' of social authority is the *societas ipsa*. in a natural society, it is the 'Subject' determined by nature itself: in a *societas per alium constituta*, it is the *constituens* It is possible, however, for social authority to be transferred, in substance or in exercise; and consequently, while it always belongs to its original holder as a perfect, unlimited and proprietary right, it may be vested in the subsequent holder as a right which is imperfect, limited, usufructuary and non-transferable. *Imperium*, or the *jus dirigendi actiones membrorum societatis* so far as the welfare of the society may demand the curtailing of liberty, is only a part of social authority. There is therefore no *imperium* without *societas*, as, conversely, there is no *societas* without *imperium*. *Imperium* includes the power of punishment For the rest, the total authority exercised by any society includes three general powers—the directorial (*rectoria*), the supervisory (*inspectoria*) and the executive (*executoria*), besides such special powers as the object of a society may require (71).

When he proceeds to consider and classify the *species societatum*, and to draw, in the process, a distinction between the 'equal' and the 'unequal' species of society (72), Nettelbladt is obviously precluded, by the basis which he has adopted, from explaining the difference between these two species by the presence or absence of a social authority Upon his view, social authority is equally present in both. [The difference between them must therefore be explained, not by the presence or absence of social authority, but by a difference in the residence of such authority.] In a *societas aequalis*, the authority does not belong to one of the members, or to a part of the members, who exercise it over the rest; it is the property either of the whole body itself (*penes omnes simul sumptos*)

or of an *extraneus*. If the society has constituted itself, there is a presumption in favour of the rights of the members generally: if it had been constituted by a third party, the presupposition is in favour of that party (73). In a *societas inaequalis*, on the other hand, one of the members, or some part of the members, may properly exercise authority, either limited or unlimited, over the whole body; but it is also possible for a *societas inaequalis imperfecta* to exist, in which some of the rights of social authority remain with the whole body of the members (74).

The further development of Nettelbladt's argument leads him to the view, that the *jura socialia societatis* which are derived from the nature of a society may be held to include all the rights which we now describe by the name of 'internal rights of corporations' (75). This is a view which he still continues to maintain, as a general principle, when he comes to describe in detail the relations between associations and the State. But there are certain modifications [of this general view], which result from an application of the general principles of Natural Law regarding the subordination of *societates minores* to the *societas major* in any *societas composita*. The nature of these modifications differs considerably, according as the connection between a contained association [or minor society] and the body politic [or major society] is close or loose (76). In this connection Nettelbladt distinguishes five main kinds of *societates*.

The first is *societates publicae in sensu eminenti tales*, which are regarded as including 'colleges', such as Estates, which possess, in whole or in part, the State-authority itself (77) The second is *societates quae sunt magistratus*, that is to say collegiate magistracies or boards. These are bodies created by the Sovereign for the exercise of functions of government; and therefore the rights which any such body possesses (its *jura socialia*) are by the nature of the case, and apart from any question of their being taken over into his hands, the rights of the *Superior* (78). The third is *societates publicae stricte sic dictae*, which are constituted by the Sovereign for other objects of general and public welfare, and are only distinguished from magistracies by the lack of coercive authority (79). The fourth is *universitates personarum*, or in other words local communities and other communal groups, which are alike in drawing their origin from an act of State-authority, but which may, none the less, have very different constitutions (80). The fifth and last is *societates privatae in republica*, or voluntarily formed 'Fellowships', *quae sibi ipsis originem debent, sicque publica auctoritate interveniente non sunt*

constitutae. Their creation is permissible—so far as their object is not in itself improper, or incompatible with the position of a subject—in virtue of *vis libertatis subditorum civilis*; but, at the same time, '*confirmatio seu approbatio Superioris utilis, non necessaria est*'. These 'private societies' possess a social authority of their own, in all matters of dispute, as soon as they come into existence; and this authority includes not only the general *jura socialia* already mentioned [i.e. *potestas rectoria, inspectoria* and *executoria*], but also the special rights which their particular object requires (81). But they still remain subject to State authority in any case of doubt. True, the Sovereign has no *jura societatis* by virtue of which he can control them: he has only the *jura in potestate civili contenta*; but the effect of this is that their own *jura societatis* ... *eatenus subordinata sunt potestati civili, quatenus salus Reipublicae id requirit* (82). There are, however, two ways in which this normal position [of private societies, or voluntary Fellowships] may be varied. On the one hand, corporations may be *liberae*, and as such exempt from the general suzerainty of the State over corporations; they may even be *privilegiatae*, and as such own rights of political suzerainty themselves, as their own *jus proprium* (83).* On the other hand, and in the opposite sense, the political Sovereign may himself possess the *potestas societatis* in and over a corporation. Before he can possess it, however, he must have a proven and particular title to such power, as distinct from the general power which belongs to his position as Sovereign: he must have, e.g. a title arising from *delatio a societate*, or from *devolutio*. Even in such a case political authority and social authority must continue to be distinguished; and a clear line of division must always be drawn, even when they are personally united, between *jura majestatica* and *jura collegialia* (84).

There is hardly another system of Natural Law which can be said to contain so full or so logical an exposition of the theory of associations; but views of the same general character were very commonly held. Achenwall, for example, tries to distinguish between the inherent and the acquired rights of societies; and he seeks [in dealing with inherent rights] to show that associations have a social authority of their own (85). The same is true of Hoffbauer (86). He relies largely on the views of Nettelbladt; in par-

* E.g. a guild or fraternity may be *libera*; and a chartered company (such as the English East India Company) may be *privilegiata*, and exercise rights of political suzerainty as *jura propria*.

ticular, he repeats his division of societies into those which are 'public', and constituted by the State itself for political objects, and those which are 'private societies', created by the citizens of the State for the attainment of their own private objects. He proclaims an express 'right' of the citizens to unite in private societies, provided that their object is not in contradiction to that of the State, and to determine freely the constitution of such societies (87). There were other writers towards the end of the eighteenth century, and among them some of the sternest individualists of the time, who proclaimed liberty of association as one of the fundamental natural rights of the Individual, and espoused its cause against the encroachments of political authority. A. L. von Schlozer, for example, can write—'In the general society, individuals may emerge who are engaged in a similar effort to attain human happiness. A number of them will associate and form a group, if they believe that they can attain a lawful object, by that means, more effectively than each of them can attain it for himself .. The great society must not only allow such groups to arise, it must also protect them: the ideas and the acts of each guild are only a matter of concern to the general society, in the sense that they ought not to run counter to the civil contract' (88). W. von Humboldt was no less ardent a champion of the right of free association. When civic co-operation was really necessary, he argued, the free group was preferable to the political institution as a means of dealing with all objects other than that of public security, and, in particular, for the purpose of promoting the advancement of general welfare, religion and morality (89).

Side by side with this current of ideas inspired by Natural Law, we may also trace another movement of reaction against State-absolutism and against its enmity to corporations—a movement which was based on historico-political grounds. The notion had always survived that the well-being of the social system required, not only that the life of associations should be harmoniously co-ordinated with that of the Whole, but also that it should be free and independent within the limits of its own sphere (90). Montesquieu expressly advocates the preservation of privileged corporations and their mediatory functions in a monarchical form of State, because their destruction inevitably perverts monarchy into despotism (91). In Germany Justus Moser is conspicuous for his struggles on behalf of the liberty of corporations. In his historical review of the misfortunes of his country, he never fails to celebrate

the strength and the vigour of the old Fellowship-life, or to lament the days of its suppression (92); and he draws the political moral, that a free and powerful community is inconceivable in the absence of a firm foundation in corporate life. In the strength of this belief, he espouses the general cause of liberty of associations against the dead level of legislative uniformity (93). He champions their independence: he even goes to the length of advocating the isolation of local communities, and of guilds and crafts, behind the barriers of their locality and class (94); and he recommends a fresh formation of Fellowships on the lines of voluntary association (95). 'Daily we see', he prophetically proclaims, 'what great things can be done by corporations, societies, fraternities and all such sorts of association' (96).

(3) *The natural-law conception of the internal nature of Corporations, as affected by the fact of their inclusion in the State*

If we turn, in conclusion, to enquire what was the natural-law conception of the *internal nature* of corporations, the answer is largely to be found in the account which we have already attempted to give of the natural-law theory of Groups in general We have still, however, to trace the application of this general theory to local communities and Fellowships in one particular respect. How was that theory modified, when it was applied to these bodies, by the fact of their being included in the State?

In seeking to answer this question, we must begin by distinguishing two different tendencies in the natural-law theory of Groups—tendencies opposed to one another, and yet meeting or intersecting at a number of points. One of them led to the elimination of any idea of the real rights of corporations, in favour of a conception of the Corporation which made it purely an Institution (*Anstalt*): the other tended to encourage thinkers to reconstruct a belief in the inherent rights of corporations, by the aid of a conception of the nature of the social group which made it a Fellowship (*Genossenschaft*).

(a) The Corporation as an Institution (Anstalt).

A view of corporations as being of the nature of Institutions [and therefore State-created] necessarily ensued (in spite of all preliminary assumptions about the natural basis of *societates*), as soon as thinkers ceased to regard an act of agreement among its members as sufficient to explain how a *societas* could become a corporation,

and began to argue that the only force which could explain the existence of a corporation was a Ruling authority imposed from above, and imposed from without, upon the *societas*.

This was the obvious tendency of a theory which had been developed in connection with the teaching of Hobbes. This theory involves two postulates. In the first place, the unity of a group's personality is made to depend entirely on the 'representation' of all its members by a single person or body of persons; in the second place, a 'representative' power of this order is held to be inconceivable, and inadmissible, so far as regards any group which is included in the State, except in the form of an emanation from the authority of the State [On this basis, any corporate group with a single personality will be entirely a State-created Institution.] But even in the more moderate theory of Pufendorf, the institutional element [if it is not everything] still plays a decisive part in determining the nature of corporations. We may admit, indeed, that his *persona moralis composita* is made to involve, as the condition of its existence, a previous union already achieved on a voluntary basis, and held together by the internal ties between its members. But we must also notice that it only acquires the character of a genuine unity, able to will and act as such, by the addition of a representative Ruling authority; and so far as regards all *corpora civitati subdita*, this authority must proceed from the grant and concession of the State (97). At the same time it has to be added (as we have already had occasion to notice) that Pufendorf does not push his principles to their full and proper conclusion; and instead of keeping his [original] Collective and his [added] Representative unity in close connection with one another, he allows them to become detached. The result is that when he comes to treat of the property, the legal proceedings (*negotia juridica*), and the delicts of the *universitas*, he often falls back upon traditional views and expressions which really imply the principle of Fellowship (98).*

The disciples and successors of Pufendorf are under the influence of similar views [but some of them depart even further from the Institutional idea of corporations]. Going back to the idea that a Collective unity has a substantive existence of its own, and willing to allow that even a mere partnership already possesses a moral personality, they are more inclined than he was to apply a purely

* In other words, he leaves out of account the need of representation of the group, and assumes that, simply on its collective side, it can hold property, conduct legal proceedings, or commit delicts.

partnership view of corporations, at any rate in interpreting the legal position of corporate bodies in those connections where the presence or absence of a corporate authority is immaterial(99). This is particularly the case with Gundling and Hert(100); and we find both of them, therefore, more prepared than previous thinkers to abolish any real line of division between corporation and partnership(101).

Huber follows a different line. While interpreting the natural-law theory of society at large in the light of the traditional [Roman-law] theory of corporations, he also seeks to maintain a view of the Corporation which separates it clearly from other groups. He takes great pains to distinguish it from other forms of grouping—first from the State and the Family(102); next from the ordinary [voluntary] society or community(103); and finally from institutions which are without a constitution of their own(104), and from collegiate magistracies which have no particular and specific purpose(105). When, however, he comes to discuss the rights and duties of the Corporation [he seems to alter his ground; for here] he avails himself largely of a distinction between two totally different elements which he regards as being involved—the element of a 'society' or partnership which rests upon its own basis, and the element of an 'institution' which is imposed on that society. In explaining the rights and duties of the Corporation which fall within the area covered by the contract of society [i.e. the area corresponding to the first of these elements], he applies the idea of a purely Collective group-personality, using for the purpose the relevant doctrines [about *societas* or partnership] in the theory of the civilians(106). In explaining the rights which fall within the other area [i.e. the area corresponding to the element of the 'institution'], where the dominant notion appears to be that of a Whole superior to its individual members, he adopts the idea of a sphere of authority derived from, and delegated by, the sovereign power of the State(107). If we consider separately the two sorts of elements which are present in a Corporation, he proceeds to argue, we shall say that those of the first sort are not generically different from the elements present in a simple *societas*(108), and that those of the second sort are the same in kind as the elements present in any collegiate magistracy instituted by the State(109). If, however, the two are brought into union (a union which, it must be admitted, remains purely external), the product, in his view, is a structure which is *sui generis*—that of the *Universitas*. Views of a

similar character, though not always so clearly or so definitely expressed as they are by Huber, may be traced in other writers, who seek to transplant into Natural Law the distinction drawn by positive law between the *societas* and the *universitas*(110). The ultimate result of such views is that the Corporation is treated as being at one and the same time a Fellowship, in the sphere of private law, and a State-institution, in the sphere of public law(111).

The same result was also attained, on the basis of pure Natural Law and without any reference to positive law, by thinkers such as J. H. Boehmer and his successors, who made the rights of corporations issue primarily from the conception of the *societas aequalis*, interpreted as a society which possessed no social authority. It was possible, along this line of approach, and by using this idea of the natural society of equals (in a heightened form which made it tantamount to a Fellowship), to find a source and a justification for such rules of the law of corporations as presupposed nothing more than a mere union of Many to form a One(112). [But this was all that was possible.] When it came to explaining the existence of a real corporation, with a real capacity for life and action—a thing which it was impossible to conceive in the absence of an organised group-authority—these theorists found themselves forced to take refuge, after all, in the idea of the State 'institution'(113).

A different situation arose if the assumption were made that even a *societas aequalis* did possess social authority, or if, again, it were admitted that a contract between subjects of the State might have [of itself, and without any intervention by the State] the effect of producing a *societas inaequalis*. But it is to be observed that even those who advocated the liberty of corporations most ardently on this basis were content to limit their actual application of the pure 'Fellowship' principle to the groups which they called by the name of 'private societies'. 'Public societies' were ascribed by these thinkers to an act of State-creation; and local communities were accordingly treated in their theory as essentially State-institutions(114)

The extremest form of a purely 'institutional' conception of corporations was that which finally appeared, as the basis of attacks on the very existence of all corporations, in the militant theory which spread from France over Europe(115). Hatred of the Corporation was primarily based on the revolt of the individual against the yoke of obligation imposed on him by his predecessors;

and an exclusive prominence thus came to be given to this factor of obligation, which the Corporation possessed in common with the 'Foundation' (*Stiftung*).* Many writers hardly drew any distinction at all between the Corporation and the Foundation(116); and Kant definitely treats the Corporation as only a secondary species of Foundation(117). Even among the most ardent panegyrists of free association there are some who frown on all true corporations, because they regard them as being, in the same way as 'foundations', a control of the living by the dead(118).

(*b*) *The Corporation as a Fellowship* (Genossenschaft), *especially in the theory of Nettelbladt.*

Turning to the other of the two tendencies we have mentioned, we have now to trace the emergence, in the School of Natural Law, of a 'Fellowship' view of the Corporation. The vogue of such a view depended on the extent to which the legal position of corporations was interpreted as the result of a voluntary contract of society.

Up to a point, as we have already shown, this Fellowship view was the inevitable result of the natural-law theory of society. The natural-law theorists always held that a simple contract of partnership possessed in itself a cohesive force (an element which was absent from the conception of *societas* entertained by the civilians) capable of holding individuals together in a unity which persisted in spite of any change of membership. This view attained increased significance when a Fellowship group of this nature [i.e. a group with a unity which was not affected by any change of membership] was recognised as something more than *one* of the constituent elements in a full and complete corporation, and was regarded as capable of being, by itself and without the addition of any other element, a real if imperfect 'Subject' of rights Such a line was very generally followed in the German theory of Natural Law. Even Huber, in spite of his inclination towards civilian theory, recognised that a society could already be a moral person before it had attained the position of a *universitas*(119). The theory of Pufendorf, too, was more and more modified in a direction which led to the recognition of purely 'Collective' persons, side by side with those Group-persons which had attained their full development through the addition of a 'Representative' unity(120). Finally, we find a frank and unqualified admission (for which

* E.g. ecclesiastical foundations, or, again, economic foundations with exclusive rights, possessing some form of monopoly.

Hert and Boehmer had already set a precedent) that a *societas aequalis*, in spite of the absence of any social authority, is none the less a *persona moralis* (121). Here, at last, a purely Fellowship form of group-unity is really made to take its place, in general theory, by the side of the 'institutional' corporation. But this Fellowship form of group-unity still lacks the essential attribute of a genuine corporation. If it has the quality of being a moral person, it shares that quality indiscriminately with all forms of community in which the members can conveniently be regarded as possessing rights or duties 'jointly' (*insgesamt*) (122). It cannot develop into a Whole which is something more than its members. This Collective person, after all, is only what in Germany we nowadays call the 'joint hand' (*gesamte Hand*).*

But the natural-law theory of society had further conquests to make; and it eventually succeeded in building, on its own foundation of a voluntary contract of society, a real Fellowship possessing the rights of a full corporation. That achievement became possible as soon as the action of subjects of a State, in concluding a contract between themselves, was admitted to have the power of producing a social authority. Thinkers who made that admission were able—at any rate in dealing with Fellowships which were due to deliberate action—to broaden the rights of the simple *societas* into a comprehensive system of corporate rights without introducing any added element of State-'institution'. This will explain the rise of an influential Fellowship theory, which in Germany owed its foundation to Wolff, but which passed from him into almost all of the systematic treatises on Natural Law after the middle of the eighteenth century (123) The most elaborate statement of this theory is that which we find in the writings of Nettelbladt. His teaching has an added and special interest, partly because he supplements his statement of Natural Law, at every point, by a corresponding statement of positive law, and partly again because, in the course of adding this supplement, he steadily seeks to apply in detail the same general leading idea—the idea that the relation of the rules of positive law to Natural Law, which immutably fixes the principle of such rules, must be mainly of the nature of executive ordinance (124) † We shall thus be justified in using his doc-

* On the *gesamte Hand* see Maitland, *Collected Papers*, III, pp. 336–7. It is a form of 'joint ownership', stronger (in the sense of having less flavour of individual rights) than our English 'joint ownership'

† In other words, positive law must be related to Natural Law much as 'statutory orders', or '*règlements d'administration publique*', are related to legislation.

trine, which may be regarded as typical, as the basis of our account of the [eighteenth-century] natural-law theory of the Fellowship.

We have already seen that Nettelbladt and the other writers of his way of thinking are under the influence of a view which resolves the existence of a group, in its internal aspect, into a sum of individual relations, and yet at the same time consolidates it, in its external aspect, into a *persona moralis* possessing rights and duties in the same way as an individual(125). In accordance with this view, they begin by assuming that the internal rights of corporations, so far as they possess inherent validity in relation to the State,* are entirely the result of contractual agreements. The basis of such rights is the original contract for the formation of a society, which already brings into being a more or less comprehensive social authority(126). The authority so created, though it actually contains all the elements of a genuine corporate authority, is juristically speaking no more than a contractually constituted sum of individual rights, and it therefore derives its power from a continuous act of assent on the part of the associated members(127). In itself, such authority belongs to these members only, in their totality(128); but it may be transferred, by a further contract, either in whole or in part, to a single or a collective person(129). If this is not done, and if the society thus remains a *societas aequalis*, all the members as a whole are still entitled to exercise social authority; and on this it follows, first that every exercise of such authority properly requires a fresh contractual agreement of wills among all the members, and secondly that, if a majority-resolution is allowed to count as *communis consensus*, or the action of representatives is reckoned as the action of *universitas ipsa*, this can only be the case in virtue of a previously made and unanimous agreement to that effect(130). In addition, there are also special contracts to be considered. A special contract is necessary to enable new members to be accepted, and to make possible the alteration of *personnel* which such acceptance involves(131): similarly the exclusion of previous members can only, as a rule, take place by way of a similar contract(132); and in the same way, again, the appointment and authorisation of the officers of a society always depends upon the conclusion of contracts to that effect(133).

None the less, and although it is thus constituted merely by

* There may be *some* internal rights of Corporations which are given by the State, and do not therefore possess 'inherent validity' in relation to the State.

contractual relations, a Corporation, in virtue of the union of powers and wills which is produced by the various contracts, becomes a single Group-person in its external relations; and as a *persona moralis*, it stands on a level with the Individual (although it is not in itself an Individual), and it is therefore included in the general scheme of the rights and duties of *singuli* (134). This last idea is one which we find particularly applied by Nettelbladt, and applied both in treating of natural and in treating of positive law. The method which he follows in dealing with *jurisprudentia socialis* [or the law of associations] is to begin by developing, in a first section, a general theory of associations, and then to proceed, in a second section, to a systematic exposition of the methods by which the law relating to the rights of individuals can be applied to 'societies'* (135). In his treatise on Natural Law, he begins this exposition with the theory of acts (*Handlungen*); and here he starts from the axiom that the *societas* has to be reckoned as the author of any *actio* which *volente societate edita est*. This, he argues, is the case [i.e an act really has the will of a society as its author] (1) so far as concerns unequal societies, or equal societies not having any *potestas* of their own, '*quando superior harum societatum vi potestatis sibi competentis hoc vel illud fieri vel non fieri voluit*', and (2) so far as concerns a *societas aequalis* having power of its own, when any act '*ex concluso societatis fit vel non fit*' (136). Nettelbladt is thus led to insert, at this point, a detailed theory of the acts of corporations. In its course he not only succeeds in making the Law of Nature explain nearly every one of the maxims [in regard to the acts of corporations] which had been developed by the civilian lawyers in the course of centuries of effort; he even lays down subsidiary rules of Natural Law in regard to matters (such as differences of voting power, the greater weight of the *vota saniora*, and the method of taking divisions, or *itio in partes*) which, as he himself admits, essentially depend on positive law (137). In his other treatise, where he states the positive law on these matters, he has left himself little to add; but it is noteworthy that he pronounces the treatment of a *universitas* as a *minor* to be entirely a rule of positive law (138).

Other writers on the Law of Nature show a similar inclination for dealing in considerable detail with the theory of corporate

* Nettelbladt wrote both a *Systema* of general Natural Law, and a *Systema* of general positive [German] law. In both treatises alike, when he comes to treat of the law of associations, he follows the same plan—writing a first section on the general theory of associations, and then a second section on the application of the rights of individuals to associations.

acts(139). It has already been shown, in a previous section, that the fiction of a unanimous agreement in regard to the taking of future decisions was constantly used as a way of reconciling the validity of majority-decisions with the idea (still firmly held as a matter of principle) that any unity of a number of wills must necessarily possess a contractual character. It has equally been shown that majority-decision was steadily degraded to the position of a mere exception from the general requirement of absolute unanimity, which had come to be regarded as properly applying also to the acts of corporations [no less than to those of public deliberative bodies](140). Here we need only draw attention to the fact that natural-law theory was inevitably forced, by following this line of argument, to confine the majority-principle within the narrowest possible limits, and (more especially) to extend the scope and to emphasise the inviolability of the *jura singulorum* which were regarded as sacrosanct from the rule of number(141).

Returning now to Nettelbladt's exposition of the application of the rights of individuals to 'societies', we are next confronted [after he has concluded his theory of the acts of corporations] with a view of 'things' (*Sachen*) as the objects of corporate *dominium vel quasi-dominium* * Here he introduces [in dealing with the natural-law aspect of the matter] the notion that a 'society' may own a property peculiar to itself (*dominium solitarium*), as distinct from any joint property of the members; and he argues that Natural Law itself can provide a basis for distinguishing such '*res societatum patrimoniales*' from '*res societatum in species sic dictae*', because it can supply the criterion, 'Does *usus* belong to the *tota societas*, or does

* Gierke's analysis of Nettelbladt's exposition of the rights of *societates* (as given in his two 'systems') is somewhat difficult Roughly we may put it as follows. Gierke argues that the exposition shows a wavering between the idea of group-life and group-action as the life and action of the Whole, and the idea of such life and action as the life and action of all the individual members—with an inclination to the latter He has already illustrated this argument with regard to (1) the acts or decisions of associations, and he now proceeds to consider in some detail (2) the property of such bodies, (3) their by-laws or *leges*, (4) their *negotia juridica*, and (5) their obligations. Under the last head he discusses particularly Nettelbladt's view that associations have no obligation, and are not liable, in cases of delict

His analysis next passes to (6) the rights of individual members against associations, (7) to the possibility of associations having possession or quasi-possession and (8) to legal remedies applicable to associations. Here the analysis seems to become a simple paraphrase, with less of a constructive argument running through it. The translator has not ventured to omit any part of the analysis, but he confesses that it runs into detail.

it belong to the *singula membra*?' (142). When he comes to deal with the positive-law aspect of the matter, all that he finds it necessary to do, in fitting the property of *universitates* into these two categories, is to pay attention to some few particular legal questions which arise (143).

He next deals with the *leges societatum* [or by-laws]. When he is dealing with the matter from the standpoint of Natural Law, he confines himself to the remark that, so far as regards *societates aequales cum potestate*, such *leges* or by-laws are no more than *leges conventionales*, because they are simply based on a *conclusum*; while, as regards societies with an *Imperans*, they are *leges proprie sic dictae*, because they are promulgated by the head of the society (144). When he deals with the matter from the standpoint of positive law, he goes more fully into the scope of *statuta universitatis*, which are made to include 'observances' or customary rules, regarded as tacit enactments (145).

From by-laws, he turns to the legal proceedings of corporations (*negotia juridica*), distinguishing them from the legal proceedings of individual members, and dividing them into *negotia publica* (which in turn may be subdivided into *interna* and *externa*) and *negotia privata* (146). In the same way, when he comes to expound a theory of the *obligationes societatum*, he distinguishes the obligations of individual members from those of the society itself, but all that he actually mentions under the latter head, when he is treating of the matter from the standpoint of Natural Law, is obligations arising in the course of legal proceedings [i e. of civil litigation] (147). It is only when he is treating of obligations from the standpoint of positive law that he ever mentions obligations incurred in connection with delicts. This omission is to be explained by the fact that he regards the *universitas* as altogether incapable of *dolus* or *culpa*;* and he therefore pronounces not only against the possibility of the punishment of a *universitas*, but also against its duty to pay compensation, even when there is a question of some unauthorised act committed by all the members in their corporate capacity (148). Suddenly to deny intellect and will to a *universitas*, as Nettelbladt does in this connection, is to present the reader with a double difficulty—that of reconciling this particular opinion with

* On these terms, and the general problem of liability, see Pound, *Introduction to the Philosophy of Law*, c III. The issue here raised, of the liability of groups in case of delict, may remind the English reader of some of the problems of Trade Union law.

the rest of his views, and that of understanding the opinion itself, in the form in which he proceeds to express it. Suppose, we are told, that an illegal act has been committed on the part of *omnes singuli*. Then, in so far as these *singuli, in iis quae tangunt finem communem, sunt ut unus intellectus et una voluntas*, the illegal act—though it cannot be reckoned as *factum universitatis, cujus auctor debet esse universitas*—must still be reckoned as *factum tale singulorum ex universitate, cujus coauctores sunt omnes qui constituunt universitatem* (149). [This is a perplexed saying; and] in view of the general perplexities in which he becomes involved, we can readily understand why most of the writers on Natural Law were far from sharing Nettelbladt's radical dislike of the idea of corporate delicts (150).

In dealing with rights, as well as in dealing with duties [or obligations], Nettelbladt attempts to distinguish sharply between the sphere of the community and that of individuals, pitting against the rights of any *societas*, whether inherent or acquired, the *jura singulorum* which the society cannot touch. His natural-law theory of the rights of individual members, which came to exercise a considerable influence, proceeds upon the principle that such separate rights of individuals are always present *si membra societatis, quoad punctum definiendum, ut una societas considerari nequeunt*. This, he contends, is not only the case (1) when a legal question lies altogether outside the *nexus socialis sociorum*: it is also the case (2) when, though that *nexus* is present, there is either (*a*) a question of some right of a member which is something more than that of joining in the exercise of a right belonging to the Fellowship, or (*b*) a question of a superior or separate right of a member, or of a class of members. He accordingly enumerates a list of *jura singulorum*, including

(1) all rights acquired by voluntary actions which are undertaken outside the area of the society;

(2) any right acquired by a *titulus specialis*, even though such a right may affect the society, e.g. *potestas, jura directoralia*, and *officialium jura officiis cohaerentia*;

(3) the right to appear and vote in meetings;

(4) a right of user of the *res societatis in specie sic dictae*.*

He adds, however, that all this is true with the reservation, *quatenus omnia haec jura salva obligatione, qua socius societati obstrictus*

* It would appear that no 1 in this list corresponds to no 1 in the preceding sentence, no. 2 corresponds to no 2*b*, and no 3 and no 4 to no 2*a* (The right to attend meetings and vote, and the right of user, are rights of the individual *qua* individual, and they are thus 'something more than joining in the exercise of a right belonging to the Fellowship'.)

est, exercentur (151). When he expounds the positive law of the matter [in his other treatise], he assumes the validity of these general natural-law principles, and he only indicates some peculiar features in the rights of *universitates* [under positive law] which differentiate such rights from those of private persons (152).

He next treats of possession and quasi-possession by societies. Possession *de facto*, he holds, is certainly as much possible for a society as it is for a *persona singularis*; but it is always necessary to distinguish the case in which individuals are *de facto* possessors on their own account from that in which they enjoy such possession *societatis nomine*. Where the possession is possession *de jure*, it is again true that the rules which hold good for *singuli* are equally applicable to societies, both in regard to *jus possidendi* and in regard to *jus possessionis** (153). In dealing with possession in his treatise on positive law, Nettelbladt repeats these general principles (154), supplementing them by a careful exposition of the rules about acquiring and losing possession in cases where the other party is a *universitas* (155).

Finally he treats of *remedia juris in applicatione ad societates*. In this connection he develops a theory both of the peaceful settlement of disputes by compromise, conciliation and arbitration, and of their forcible decision by war or reprisals (156). He also propounds a theory of judicial procedure (*Gerichtshilfe*), dealing first with the power of a society to decide, in cases of dispute, in regard to rights and duties belonging to its members as members (157), and then with the position of societies when they are parties to a case (158).

It is obvious that Nettelbladt's general natural-law theory of associations represents a vigorous reaction of the German conception of Fellowship, which had never been utterly submerged, against the foreign conception of the Corporation. In his theory the *persona ficta*, affixed to the group by an act external to itself, has disappeared; and there appears instead an internally united group, shaping itself by its own power into a Whole, with a capacity both for the enjoyment of rights and for action, and yet, at the same time, assuring to each individual member his own separate sphere of activity in the community. And yet we have to confess that the corporate body so constituted is prevented by its indivi-

* The distinction between *jus possidendi* and *jus possessionis* is a distinction between having a legal title to possess, and having the right which arises from being in possession whether or no there is a legal title to possess.

dualistic structure from rising to the stature of a substantive Group-being. It is not distinct in kind, but only in degree, from any casual society or community. It is significant that Nettelbladt is unable to give any definition of the idea of a *universitas* other than that it involves a *societas plurium quam duorum** (159).

[Just as the natural-law theory, as it appears in Nettelbladt, seeks to abandon the Roman-law notion of the corporation, and to return to the German idea of the Fellowship, so] from another point of view, we may admit that it also breaks away from the Romanistic conceptions of *societas* and *communio* [partnership and co-ownership], and gives new life and vigour to the German conception of the 'joint hand' (*Gesamthand*) † The division of every system of common interest into separate spheres belonging to the several members is no longer regarded as necessary; on the contrary, there are seen to be various ways in which a fusion of individual spheres of interest into a single common sphere may be achieved. But our admission must at once be qualified. Natural-law thinkers were unable to express such a union of persons [in a common sphere of interest] by any legal conception other than the self-same notion of *persona moralis* which they also used to explain the 'Subject' of full corporate rights. They invoked this *persona* everywhere They vested the community of husband and wife, the community of parents and children, the community of master and servants, with 'moral personality'. they even regarded the family-community [which included all these three communities] as a moral person composed of a number of members which were moral persons themselves (160) Starting from the basis thus provided, Nettelbladt allows himself to glide imperceptibly into a Fellowship conception of the broader family-group [i.e. the 'House', including all the members of a princely or noble family]; and then

* The point of view of this paragraph regards the Group in itself—'Is it a Roman *universitas* or a German Fellowship?' The point of view of the next regards the Group in relation to property—'Is its property a matter of Roman *societas* and *communio*, or of German *Gesamthand*?'

† 'The intimate conjunction of two things, so that they are no longer separable (e.g. *A*'s gold and *B*'s silver to produce electrum)...sometimes produces co-ownership in the whole (*communio*)' (Poste's edition of the *Institutes of Gaius*, pp. 166–7) The difference between Roman co-ownership and the German *Gesamthand* may be roughly said to be the difference between (*a*) two or more persons each laying a hand on the same thing at the same time, and each saying, 'This is mine—up to such and such a point, though it is yours beyond', and (*b*) two or more persons laying joint hands on a property, and saying, 'This is ours, in the sense that it belongs to all of us'.

[leaping from Fellowship to corporation, because the elastic idea of the moral person can easily be stretched to that further point] he finds himself enabled to take the rules of law relating to the rights of corporations and to apply them to the aristocratic House and the House-property belonging to the 'line' (161). Without further ado, the idea of their being separate moral persons is next applied to all the collegiate or collective organs which act on behalf of a group, and even to all the sub-groups which exist within it (162); and, finally, no objection is taken to the idea of extending a moral personality (uniting, or supposed to unite, the various parties concerned) even to cases of mere profit-making companies, or of simple co-ownership, or indeed of any other matter of common rights or common duties (163).

The distinction which properly separates a system of common relations from a system in which there is a common 'Subject' of rights was thus completely obliterated All this tended, in no small degree, to encourage a return to Germanic conceptions of law, and to promote a more realistic treatment of the actual factors in our own domestic legal institutions; but the price which had to be paid was the sacrifice of a true conception of Group-personality (164). Only by the use of artificial arguments was it possible for this uniform theory of all societies to conceal (and then only partially) the contradictions which followed on the fitting of dissimilar things into the same Individualistic-Collectivist mould. We can trace this result [i e. the concealing of contradictions by the use of artificial arguments] at various points.* First of all, in order to make the

* Gierke is here arguing that a theory which makes a Group a Collection of Individuals (under the name of *persona moralis*), and which has thus both a Collectivist and an Individualistic basis, will necessarily be inconsistent, will betray its inconsistencies when it tries to get all sorts of groups into its scheme; and will be driven to seek to conceal its inconsistencies by doing violence to one or other of its bases (1) It will do violence to its Collectivist basis (i e. its idea that a Group is a collective body over and above the individual members) when it tries to fit into its scheme a case of individuals owning property by 'joint hand', for here it will make concessions to the rights of individuals which really contradict that basis. (2) It will do violence to its Individualistic basis (i e. its other idea that a Group is only a number of individuals) when it tries to fit into its scheme the case of a corporation, for here it will make concessions to the rights of corporations which really contradict *that* basis (3) It will do violence to both its bases when it tries to meet a case which cannot be met at all by the idea of a Collection of Individuals (in whatever way that idea may be interpreted); for here it will introduce another person, a *persona repraesentativa*, who is something more, and something above, the Collection of Individuals described under the name of *persona moralis*.

conception of the Collective person applicable to cases where there was merely a question of 'joint hand', this would-be uniform theory had to make concessions to the rights of individuals which ended in cancelling any idea of a Group-person as something distinct from the individual persons who composed it (165). Secondly, in order to combine the fact of corporate unity with its conception of the merely Collective person, the theory had to find room for principles [about the rights of Corporations] which could only be reconciled by dint of a violent interpretation with its basic idea of a Whole as something simply constituted by the addition of Individuals (166). Finally, in cases where it was forced to postulate a Group-unity which was independent of the sum of the members for the time being, the theory was forced to go altogether outside the bounds of the *persona moralis*, and to set over against it a *persona repraesentativa*, as an 'institutional' unity [i e. a unity not inherent, but due to State-institution, and thus] created by act of commission and delegation (167).

To pursue this line of thought to its logical conclusions was, in the last result, to end by producing a total dissolution of all forms of group-existence. Curiously enough, it was the exponents of the principle of liberty of association who were most inclined to degrade the whole theory of the rights of associations into a mere form of the rights of individuals. Moser [though he was an apostle of associations] refused to acknowledge any distinction between partnership and corporation (168); and the theory of Natural Law generally ended with what we may call the evaporation of the 'moral person' into a mere terminological figure of speech (169). William von Humboldt illustrates most clearly the final consummation of this trend of thought. Concerned to substitute, wherever he can, true 'bonds of union' for the 'fetters' forged by contemporary law—to remove all permanent checks on the free individual, to make marriage freely dissoluble, to prevent legal obligations from tying the hands of future ages, to limit testamentary dispositions—he directs his ardour against 'the societies which are generally called by the name of moral, as distinct from physical, persons' (170). He argues that all moral persons have, at the very least, the same disadvantages as wills and testaments. They always involve a unity which is independent of the sum of their members and which continues over a long period of years. It is true that many of the disadvantages which they produce in Germany are only the result of their possessing exclusive privileges,

which are not inherently connected with them, but in virtue of which they often become, in effect, 'political bodies'. But apart from such added privileges, and considered only in themselves, 'they bring in their train a considerable number of inconveniences. And yet their disadvantages only arise when their constitution compels all the members to use the common resources in a way they do not wish, or when, by requiring unanimity, it really forces the majority to obey the minority'. Otherwise, 'societies and associations are the surest means of fostering and advancing human development'. The best course would be that the State should simply enact 'that any moral person, or society, should only be regarded as a union of its members for the time being, so that nothing should hinder them from deciding at their discretion, by a majority of votes, on the use to be made of common powers and common resources'. Such an enactment, however, must not be allowed to involve—what has often happened where the clergy are concerned—that the members are turned into mere tools.* As for the legal regulation of all such unions—'the principles of testamentary dispositions and contract are adequate'(171).

II. Groups above the State

International society and federations

The contradictions we find at work in the natural-law theory of corporate bodies are reflected in its treatment of super-State Groups.

The problem of the extent, and the nature, of international society still continued to be met by a variety of solutions. If the state of nature were conceived as an absolutely non-social state; and if, again, international law were regarded as simply the Law of Nature, still continuing to prevail between States because they were *personae morales* who still continued to remain in a natural state of liberty and equality—then the logical result was a total rejection of any idea of a general 'society of States'. For a time it appeared as if, owing to the prestige of Pufendorf, a view of this sort would actually hold the field(172). In the long run, however, the opposite theory triumphed. Assuming [not an original non-

* If a group is given liberty, by an enactment of the State to that effect, to determine freely its policy from time to time, without being restricted by the dead hand of the past, it should not use its liberty to turn its members into the tools of a particular policy, as ecclesiastical groups have often done.

social condition, but] an original community of all mankind, thinkers argued that the state of nature which continued to prevail among States must necessarily be a state of natural society. Even when they made the solitary individual their starting-point, they could still attain the same result. They could proceed to add, to their postulate of the solitary individual, the idea that the creation of a social condition was none the less to be regarded as a stage in the development of Natural Law; and they could then argue that Natural Law [in the course of its development] dictated, or at any rate postulated, a society of Nations. With this conclusion there generally went hand in hand the recognition of a body of positive international law, which was held to be due to a further development of 'natural' international law, among the society of Nations, through a process of express or tacit consent. The conception of a universal society of States was successfully vindicated by Mevius, by Leibniz, and by other opponents of the theory of Pufendorf(173): it was also maintained by Thomasius(174); and it was finally restored* in its integrity by Wolff and his successors(175). With the aid of the natural-law category of *societas aequalis*, an attempt was made to qualify the nature of this international society by adding the idea that the original liberty and equality of all the sovereign *personae morales* remained intact, notwithstanding the existence of a 'social' obligation(176). On the other hand we also find Wolff, and other writers, reviving the idea of a *civitas maxima*, and holding that every State, in its capacity of a citizen of this great City, was subject to a real group-authority(177)

The existence of particular societies of States [or federations] was also recognised by all the writers on Natural Law. [It is true that the idea of a real federation found little favour.] After Pufendorf had once rejected the notion of a 'composite State', in the form in which it had been developed on the basis of the positive law of the Holy Roman Empire, it became the orthodox, and we may almost say the unquestioned, view in the School of Natural Law that a State which stood above other States was an impossibility(178). [But other and lower forms of federation were allowed to be possible.] Not only was it admitted that relations of partnership between different States might eventually grow out of simple alliances(179); a distinction also began to be drawn between *foedera simplicia*, or mere leagues, and *systemata civitatum* which had

* Gierke is thinking of the medieval view of a single '*humana civilitas*' when he speaks here of 'restoring', and, a few lines later, of 'reviving'.

the effect of permanently uniting a number of States in a single *corpus*. These 'systems of States' were then further divided into 'unions' and 'confederations'. The term 'union', in its original connotation, was confined to a personal union(180); but the conception began to gain ground of a real union, under which some two or more States, in addition to having a common Head, had also pooled their rights of sovereignty(181). 'Confederations', or *corpora confoederatorum*, were interpreted as being Leagues of States (*Staatenbunde*) in which the sovereignty of the several States remained intact, and was only 'exercised' in common, and that, moreover, only to a limited extent—with the result that, though the whole might appear to be a State, it never really was so (182). Pufendorf applied this line of interpretation rigorously, and absolutely refused to admit the validity of majority-decisions in any form of confederation(183). But there were many who took a different line. Though they accepted the natural-law conception of the *societas aequalis* as applicable to confederations, they were none the less prepared to admit that a confederation possessed some 'social authority' of its own; and while they differed about the extent of that authority, the general result of their views was to render possible some approach to the full federal form of State (*Bundesstaat*) (184). Nor was this all. If only they cast a glance at the Holy Roman Empire, thinkers had to confess that at any rate in actual life, if not in theory, there were intermediate formations to be found, which lay mid-way between the federal form of State and the unitary State with autonomous provinces; nor could even a Pufendorf abolish those intermediate formations by declaring them 'monstrous' and 'irregular'*(185). In such cases, just as in the analogous case of the theory of the mixed constitution, the irregular forms gradually came to be treated as justifiable exceptions from the rule(186).

Finally, the conception of the federal State was again admitted to a regular place in orthodox natural-law theory. Leibniz(187) and Montesquieu(188) had already defended it to some extent: Nettelbladt restored it fully to its position(189). He made a definite

* Gierke's point is that thinkers were not only forced to go beyond Pufendorf's category of the confederation, and to make an approach to the federation proper, but they were also forced to recognise the *de facto* existence of a form of State which was something more than a federation, though something less than a decentralised unitary State. This intermediate form was the Holy Roman Empire, as it existed down to 1806.

distinction between all unions, or systems, and the *respublica composita* proper, in which both the whole and the part were States(190); and he found it possible, on this point as on so many others, to elicit principles from Natural Law which were curiously and admirably in accordance with the actual positive law of Germany(191).

III. Groups within the State

The Church

When we turn to conceptions of the Church and its relations to the State, we find the natural-law theory of society exerting an overwhelming influence, and bringing under its spell, to an ever increasing degree, the whole of the literature of ecclesiastical law. The natural-law theory of the Church may thus be appropriately treated, not as a separate theme, but in its connection with the positive-law doctrine [of churches and their rights] to be found in ecclesiastical law (192).

[The section which was to have dealt with the natural-law theory of the Church after 1650, and which would thus have completed the sketch given in § 14, III, was never published.]

APPENDICES

APPENDIX I

ERNST TROELTSCH

THE IDEAS OF NATURAL LAW AND HUMANITY IN WORLD POLITICS*

§1. *The contrast between German thought and the thought of western Europe*

Above the practical and temporary questions with which we are confronted to-day, there rises the theoretical and permanent problem of the difference between the German system of ideas—in politics, history and ethics—and that of western Europe and America The latter of these systems has its marked internal discrepancies, and there are points at which it occasionally approaches the German system of ideas; but it unquestionably possesses a logical unity of its own We only need read James Bryce's great book on *Modern Democracies* to be convinced of this fact Similarly, in spite of all the intellectual differences which are so marked a feature in our own life, there is also a logical unity in our German system of thought. It is a unity which every foreigner immediately feels, even if he cannot define it If he is unfavourably inclined towards us, he recognises it instantly, with a sort of instinctive aversion, as something alien; while conservatives in all countries, and especially in northern Europe (though we have to remember that northern Europe is largely under the intellectual influence of Germany) feel a natural kinship with it. If you enter into conversation with the Dutch or the Scandinavians, you soon learn much which is valuable and instructive in this respect; and in the field of scholarship the works of Kjellén† supply clear evidence of the affinity. One thing which is obvious, from the very start, is that our world of ideas is confined to a

* Humanity (*Humanitat*) means the unity of mankind, or what Dante calls *humana civilitas* The idea that all men form a single society is naturally associated (as it was by the Stoics and by medieval writers) with the idea of a single Natural Law common to that society. (The division of Troeltsch's essay into sections, and the headings of the sections, are due to the translator.)

† The reference is to R Kjellén's *Die Groszmachte vor und nach dem Weltkriege*, a descriptive work of political geography

much smaller area and a far smaller population. That is the real reason why German propaganda was ineffective during the War. Even if we had possessed more adroitness, and a greater psychological gift for understanding other peoples, we could not have bridged the gulf. Neither side had the power—to say nothing of the inclination—to understand the other; and of the two sides, ours was the one which was both isolated and numerically inferior.

The same contrast also appears, in an acute form, in our own internal political struggles It supplies telling catchwords to those who seek to interpret the obvious fact of a real and practical struggle, between the different classes and interests in the nation, as a conflict of moral and theoretical principles; who desire to transform the clashes of interests which have arisen from purely natural causes into a 'spiritual conflict', and hope, in that way, to produce acute and fundamental divisions. The designation of 'western' has thus come to be applied (as it is in Russia) to all movements in favour of democracy, or pacifism, or national self-determination, or a League of Nations, or the attainment of international understanding, and such movements are then opposed to the specifically 'German' way of thought, with its historical and organic character. This is simply the old external contrast reappearing in a new and internal form; and it is applied by the very same means which were used by the propaganda of the Entente in the War The war-cries which then divided the nations are being imported to-day into our midst.

The fundamental difference between the two worlds of thought is thus clear enough in actual fact It is something which can everywhere be felt. But what is the origin of the difference? What is the genuine essence of the thought of western Europe, and what is the essence, in contradistinction to it, of the German scheme of thought? In answering such questions, we are brought up against the conceptions of Natural Law and Humanity, with the notion of Progress now added as the modern corollary of both. These conceptions, in turn, are closely connected with all the fundamental ideas of the general culture and the religious life of Europe. Their original roots go far deeper than the revolutionary zeal of modern times: they run down into the spiritual development of some thousands of years, though they have been made to assume very various forms in the course of their long history The attitude we adopt towards these conceptions determines the parting of the ways. In Germany we are unprepared, and disinclined, to understand this divergence; we are even unable to comprehend properly the terms 'Natural Law' and 'Humanity', by which the divergence has just been suggested; and our failure is answered, on the other side, by a misunderstanding and misinterpretation of our ideas, which is if anything still more drastic We must therefore go deeper into the matter in the course of our argument; and first of all we must explain the significance attached in western Europe to the terms 'Natural Law' and 'Humanity', which have now become almost incomprehensible in Germany, and have lost altogether their original life and colour.

It is essential to remember, in dealing with these terms, that we are dealing with something more than merely modern, or merely west-European, conceptions. We are face to face with ideas which are both of great antiquity (they go back to classical and Christian thought) and of general European scope; ideas which are the basis of our European philosophy of history and ethics; ideas which have been closely connected, for thousands of years, with theology and humanism. Remembering the age and range of these ideas, we can understand the innumerable applications and modifications which they have undergone, and the far-reaching practical effects which they have produced. German conceptions, in comparison, are new and modern; they are inchoate—uncorroborated by the process of world history—undigested in theory The force of conservatism and the weight of numbers are both on the side of the tradition of western Europe. This may seem paradoxical, all the more as German thought professes to be essentially progressive, democratic and favourable to the cause of revolution. But it is just this paradox which we have to master and understand.

In the first place, the contrast of 'conservative' and 'revolutionary' is one which has to be banished from the whole problem. It has only come into existence as the result of very recent complications: it is only in German thought that it is regarded as fundamental; and the reason why we take that view is that the modern democratic movement—which flows inevitably from the increase of population and the education of the masses—has only just begun to assert itself among us, and has done so in a series of revolutions. In its own nature, and apart from these temporary conditions, democracy may well assume a conservative form. American democracy, in its political and social aspects, tends to issue in the strictest conservatism; it regards its principles as the eternal and divine commands of morality and of law. The same is also true, if to a less extent, of English democracy as it has developed since 1832; it shows, as we all know, a fundamentally conservative character. Even the French regard the glory of their Revolution as the final victory of the eternal moral order of mankind, and worship it as a sempiternal dogma which is the salvation of all humanity The real revolutionary element, in all these three countries, has transferred itself to the sphere of social and Socialistic movements; and the political constitution of the democratic type is now left to wear its historical nimbus and to show its fundamentally bourgeois character. The revolutions to which democracy owes its origin belong to a far distant epoch; and they are already sanctified by history. This is the reason why it is much more difficult for Socialism to assert itself in these countries than it is in ours.

German thought, on the other hand, whether in politics or in history or in ethics, is based on the ideas of the Romantic Counter-Revolution. This was a movement which began by seeking to clear away the postulates of west-European thought, along with the scientific basis of mathematico-physical principles on which they rested. It proceeded to erect, both in the sphere of the State and in that of Society at large, the

'organic' ideal of a group-mind (*Gemeingeist*)—an ideal half aesthetic and half religious, but instinct throughout with a spirit of antibourgeois idealism. Finally, on the basis of this ideal, and in order to give it form and substance, Romanticism sought to remedy the political disunity of Germany by the erection of a powerful unitary State. As Germany pursued the complicated course of its intellectual and political history, during the nineteenth century, the thread of this guiding idea, as we shall see, was again and again interrupted, and it was repeatedly entangled in compromises which sometimes ended in making it entirely untrue to itself None the less, it is this German system of Romantic thought which is really responsible for producing the differences—differences that cut so deep, and may be traced in so many directions—between the two opposing camps.

Here we touch the core of the contrast We begin to see, on the one side, an eternal, rational and divinely ordained system of Order, embracing both morality and law; we begin to see, on the other, individual, living, and perpetually new incarnations of an historically creative Mind. Those who believe in an eternal and divine Law of Nature, the Equality of man, and a sense of Unity pervading mankind, and who find the essence of Humanity in these things, cannot but regard the German doctrine as a curious mixture of mysticism and brutality. Those who take an opposite view—who see in history an ever-moving stream, which throws up unique individualities as it moves, and is always shaping individual structures on the basis of a law which is always new—are bound to consider the west-European world of ideas as a world of cold rationalism and equalitarian atomism, a world of superficiality and Pharisaism All this needs, and must duly receive, an explanation in greater detail. We shall accordingly sketch the main lines of the common European tradition; and then we shall first of all trace the development of that common tradition into the political and moral ideology of western Europe, and afterwards seek to follow the course of German romantic ideology, through the various phases of its evolution, until we come to the historical realism of the present day

There is one fact which must not be forgotten in this connection. It is the Germany of Protestantism and Lutheranism, of Classicism and Romanticism, which presents us with difficulties of interpretation. Catholicism* stands much closer to the common tradition of Europe: it can understand that tradition better: it can come more easily to an understanding with its modern developments There are, indeed, some elements in Catholicism—elements which go back to the mediæval system of Estates, or are derived from mediæval mysticism—that connect it in some degree with Romanticism, and have produced a deceptive appearance of its special affinity to that movement. But the real genius of Catholicism is severely rational, and it is directed, as such, to Natural

* So far as I follow Troeltsch's thought, he is drawing a distinction between the two Germanies—that of the Lutheran north, and that of the Catholic south and west

Law and the idea of a common Humanity based on the rational and religious unity of all mankind.* It is this tendency that constantly reappears as the main characteristic of the Catholic system of legal and political ideas. It is a tendency which is still of practical importance to-day, and really determines the policy of Catholicism.

§2. *The common European tradition of Natural Law*

The ideas from which our argument starts are the ideas of a Law of Nature, of Humanity, and of Progress. They are ideas which are closely connected with one another, alike in the common tradition of Europe at large and in the scheme of thought peculiar to western Europe; but of the three it is the idea of Progress which is being particularly applied, and has been especially elaborated, in connection with modern life. The origin of this general philosophy is to be found in the later period of classical antiquity—in the Stoic theory of Greece and Rome, and especially of Rome; in Cicero and in certain elements of Roman Law; and finally, and above all, in the combination of these factors with Christian ideology to form the Christian system of Natural Law The fundamental conception is that of the dignity of the common element of human Reason, as it appears in every individual, and this conception, in turn, goes back to that of a 'common law', pervading all nature and the whole universe, and proceeding from a divine principle of Reason which expresses itself increasingly in the successive stages of created beings. The true nature of man is assumed to be the divine Reason operating in him, with its sovereignty over the senses and affections. Several conclusions are directly derived from this assumption. It explains the claim which the individual makes, and the duty which he admits, that Reason should be acknowledged to be the Natural—which is also to say the Divine—Law. Again, it provides the foundation of all human legal institutions, which thus become directly identical, in the last analysis, with moral principles. Finally, it furnishes the ideal of a single organisation or society of all mankind

The general background of these ideas is Pantheism, which first in Rome, and then, and above all, in Christianity, passes into Theism and a belief in an overruling Providence. The whole system of thought is innocent of any revolutionary intention; but it implies, none the less, a radical renunciation of the empirical world of actual fact In the beginning, in the golden age, men started with liberty, equality, fraternity. The almost invincible force of human affections and passions led to struggle and self-seeking But that self-same Reason which is the source of the dignity of individuals maintained itself in the face of these consequences, and created the necessary means for their repression—law, force, authority and property. This result once achieved, it now becomes the ideal of Natural Law to achieve a rational organisation of all

* Catholicism believes not in a diversified world of 'unique individualities', but in a single *respublica Christiana,* amenable to a single law

these means which shall be compatible with the natural rights that belong to the dignity of man. This leads to the idea of a cosmopolis, or world-State, in which all men are at one, and which is best organised as a monarchy, because monarchy is the reflection and mirror of the divine government of the world

The whole of this system of ideas was adopted by Christianity as a necessary supplement, or complement, to its own other-worldly and eschatological ethics, which stood helpless before the practical problems of actual society. The Christian doctrine of inherited sin made the system still more conservative in character: it made the means of repression provided by positive law appear to be far more sacrosanct, and even divine. While positive law was thus consecrated, natural rights were also attenuated. The realm of Natural Law was overshadowed and dominated by the Kingdom of God, or the Church; and in this way, and on the assumption that nature could never be free from the taint of sin, the natural-law principles of autonomy and rational self-realisation were kept within definite limits and prevented from going too far.

It was this combination of Stoic theory with Christianity that produced the Christian system of Natural Law which held sway for a thousand years, and dominated the theology, the jurisprudence, the political theory, the politics, and the history of the Middle Ages We may admit that the influence of medieval society (which was based on the institution of different corporate Estates) led the Christian system of Natural Law to ally itself with a theory of the organic differentiation of the social Whole into unequal parts, associated together on a principle of division of labour which assigned different functions to each * But this theory could, with the help of Aristotle,† be treated as a necessary consequence of the order of nature, and thus be interpreted as part of the essence of natural ethics and natural law; and by its side, and under its cover, the purely individualistic ideas of Natural Law still survived in their full vigour. Nor did they only survive in theory: they also asserted themselves actively, in all sorts of radical revolts among the various 'sects',‡ until they culminated in Ockham's theory of the State and the Jesuit views on the right of revolution. There are always two separate inspirations—the organic and the individualistic—in the 'natural' social theories of the Middle Ages, and however closely they

* I.e. the three Estates of clergy, nobility and commons were held to form a 'body politic', or political organism, which started from the principle of the inequality of the different parts, and of their contributing different and unequal functions to the common life of the organism

† Aristotle's theory of κοινωνία assumes that it is naturally based on the existence of various mutually complementary parts, which attain a higher and more self-sufficient life by exchanging their different products

‡ In his *Soziallehren der Christlichen Kirchen* (II, §9), Troeltsch traces the social ideas of the various dissident or nonconformist 'sects' of the Middle Ages.

may be connected in theory, it is always a question which of the two will actively come to the front.

It was on the basis of this Christian system of Natural Law that there developed the modern and secular system of Natural Law which we find in the writings of Bodin, Grotius, Hobbes, Pufendorf, Althusius and many less famous thinkers. Their object was partly to explain the absolutist governments which had been produced by the movement of events, and partly (at a later stage) to justify the emancipation of the citizen from such governments, and to proceed to the erection of new political ideals upon that basis. The double aspect of Natural Law still persisted. On the one hand, it was argued that the very nature of a community inevitably involved Rule and Sovereignty, and that it was necessary for a power to exist which could introduce order among sinful men—indeed it was even argued that the rights of the people had been absolutely transferred to such a governing power; and such arguments were supported by theological doctrines about the rights of 'the powers that be' and the designs of Providence. On the other hand, the movements opposed to absolutism sought comfort and countenance in ideas of inherent and indestructible human rights which were based upon the divinely appointed order of the Universe In the course of developments such as these many new movements of thought naturally made themselves felt The Humanistic revival of classical learning, and the new growth of atomical natural science, provided a variety of new ideas and methods. But the old terminology, and the old basic ideas, still persisted; and such new movements as appeared are almost exclusively to be found on the radical and progressive side—the side which had transcended the natural right of absolutism in favour of a popular and radical doctrine of the natural rights of man, and which came, in process of time, to be called the School of Natural Law *par excellence*. Here the doctrine of inherited sin has crumbled away, and its place has been taken by a convinced optimism in regard to human nature and reason and a belief that, if left to themselves, men will follow the lead of their natural interest in the community, and will solve every problem rationally by the standard of utility The disintegration of the Church into separate churches and sects, coupled with a new spirit of religious individualism, removes the control of public life by the Church, and issues in demands for freedom of conscience and the separation of Church and State. The natural sciences bring into the common stock the analogy of their own fundamental atomism and of the natural rational laws by which atoms are organised In all these ways the idea of a steadily moving Progress, and the ideal of a rational self-development of Society and the State, are evolved from the old and predominantly conservative Natural Law of the Church.

§3 *The tradition of Natural Law in western Europe since 1789*

Secular and progressive as it may be, this new Natural Law still continues, none the less, to find its basis in God's ordinance It is closely connected with rationalistic theology: it can even be the ally of Calvinism, in the extremer forms of that doctrine. With all its zest for progress, the theory still remains moderate· it retains a conservative and bourgeois character Even in the writings of Rousseau, where the idea of Natural Law finds its most revolutionary application, it has still a profoundly religious basis; and indeed—as a force impelling men in the direction of political institutions which are simple, clear and austere —it is sharply contrasted with the so-called 'progress of civilisation'. Not until the days of the French Revolution do we find the idea of Natural Law directed along the line of pure and radical Progress, and pressing towards the goal of absolute popular Sovereignty within the area of a great modern State; and the French Revolution, for that very reason, marks a break with the Church and the whole of the past. In the Anglo-Saxon world, the new idea of Natural Law is essentially a demand for personal liberty, the free choice of rulers, and the people's right of controlling the conduct of affairs by the rulers they have chosen: in France, it is a proclamation of the theory of direct self-government, the principle of political equality, and the participation of all its members in the control of the State A deep division is here involved—the division between democracy proper and a system which should be designated as Liberalism rather than democracy Besides this cleavage, and in addition to it, the practical application of this new natural-law idea of Humanity has produced, in the course of time, a great number of other antinomies and problems, which have not only gradually cooled the original ardour of its adherents, but also make any theoretical exposition of the idea to-day exceedingly difficult, complicated and self-contradictory. The difficulty can be traced in the discreet and quietly elegiac exposition of James Bryce, a widely travelled observer equally versed in theory and affairs He is conscious throughout his book (*Modern Democracies*) that he is describing the main political forces behind a development extending over a century and a half, and covering the greater part of the world, as far afield as Australia and New Zealand. This is the ground of his confidence in the type of government he describes and in the permanence of the type. On the other hand, the jurist Laski,* in his *Foundations of Sovereignty*, believes that the modern idea of parliamentary democracy is in a state of collapse; but what he is really attacking in that idea is the relics of the old natural-law theory of absolutism, and he is attacking them in the cause of a higher Humanity and real Progress.

In spite of what has been said about its antinomies and its problems, this general body of thought remains something in the nature of a consistent whole; and if it is challenged in its fundamental principles,

* H. J. Laski, Professor of Political Science in the London School of Economics.

or has to face an opposition which menaces it politically, it can be rallied together in some sort of unity to meet the challenge The reaction against it which appeared in Positivism has made no essential change in its nature. Positivists, in the last resort, are equally anxious for the unity of mankind, and they equally desire its organisation on the basis of natural laws, with due recognition of the individual's human rights and his claims to happiness. Socialism itself, in western Europe, is willing to dress its demands in the terminology of Natural Law and Humanity: it simply extends the demands for political equality and liberty to the economic sphere; and it expects the consummation for which it longs, and the coming of an ideal condition of all mankind, from the operation of the general laws of the order of the world. We need not be astonished, therefore, to find that this system of ideas, in spite of its imperfections, and notwithstanding its divisions, was able to form a common front in the hour of need against German ideology, or that it could evoke, to meet the challenge of 'German barbarism', the enthusiastic instincts of all who believed in universal ends common to all mankind—in Humanity, the cause of Natural Law, and the moral rules of Nature. Pacifism, and a belief in a League of Nations, which very naturally came to be used in their own interest by those who were originally impelled towards them by their genuine convictions, are tendencies which readily originate in this general scheme of thought:* they can be viewed as the dictates of God, of Nature, of Humanity. Another result, which follows as readily, is a gospel of liberty which would bring enslaved and backward peoples, with or without their own consent, under a régime of self-determination and self-government, and which seeks to ensure, by reward and punishment, the maintenance of that régime It was only the other day that a judge of the Supreme Court of the United States, C E. Hughes, delivered a course of lectures to students, describing democracy as the form of constitution which, if it was the most difficult, and if it made the greatest moral demands on its members, was yet the form dictated by God, by Nature and by Humanity In his introduction to the German translation of these lectures, D. J Hill, the former American ambassador in Berlin, makes the characteristic remark, that the lecturer never mentions the essential premiss on which his lectures are based—the natural and divine foundation of the rights of man—simply because it is self-evident to all Americans.

§4. *The development of German thought since the Romantic Movement*

The intellectual thought of Germany originally shared in this general system of ideas, or at any rate it shared in the conception of a Christian Law of Nature which was the basis of the system It goes without saying

* I.e. the peoples of western Europe, who held convictions about a Law of Nature and Humanity, were impelled by those convictions towards a belief in a League of Nations and a gospel of Pacifism; and they naturally used that belief and gospel to support their own side in the War ('the war to end war').

that the Germany of the Middle Ages was no less dominated by the idea of a Christian Law of Nature than the rest of western Europe; and even to-day the idea of that Law still persists in the ranks of German Catholicism. Luther, too, and the older and orthodox form of Protestantism generally, shared this inheritance; but an excess of emphasis on original sin, and a corresponding excess of emphasis on mere authority—the authority of the powers created by historic development, and thus, as it were, legitimised by Providence—invested Lutheran doctrine with a peculiar tinge of authoritarian conservatism, which the close connection of Church and State in the Lutheran system served to strengthen. The result was that, for practical purposes, the natural-law ideas of western Europe only affected Germany in the sadly attenuated form of enlightened despotism; and even the theoretical protagonists of that law, such as Wolff and Kant, proclaimed its principles with considerable reservations—reservations in favour of the actual historical environment which, as it impinges upon those principles, gradually subjects them to a rational process of modification.

The peculiarity of German thought, in the form in which it is nowadays so much emphasised, both inside and outside Germany, is primarily derived from the Romantic Movement, which itself is simply a development, a *progressio ad infinitum*, of the classical spirit of antiquity. Romanticism too is a revolution, a thorough and genuine revolution: a revolution against the respectability of the bourgeois temper and against a universal equalitarian ethic: a revolution, above all, against the whole of the mathematico-mechanical spirit of science in western Europe, against a conception of Natural Law which sought to blend utility with morality, against the bare abstraction of a universal and equal Humanity. Confronted with the eruption of west-European ideas of Natural Law, and with the revolutionary storms by which they were accompanied, Romanticism pursued an increasingly self-conscious trend of development in the opposite direction of a conservative revolution. In the spirit of the contemplative and the mystic, the Romanticists penetrated behind the rich variety of actual life to the inward forces by which it was moved, and sought to encourage the play of those forces in a steady movement towards a rich universe of unique and individual structures of the creative human mind. From this point of view Romanticism too connects itself naturally with historic tradition—not, it is true, with the theological and scientific elements in that tradition which magnified the idea of Natural Law, but rather with mystical and poetical tendencies,* which were entirely free from the influence of any such idea. The thought of Romanticism is directed to the particular, the positive: to what is eternally productive of new variety, constructive, spiritually organic: to plastic and super-personal creative forces, which build from time to time, out of the material of particular individuals, a spiritual Whole, and on the basis of that Whole proceed from time to

* I.e. the historic tradition of Romanticism goes back to the German mystics, and to the old Teutonic poetry of the Volsungs which inspired Wagner.

time* to create the particular political and social institutions which embody and incarnate its significance.

Here we touch the essence of the peculiar form which German Romanticism assumed. Writers such as Wordsworth† and Byron, Victor Hugo and de Vigny, and more especially Leopardi, use the old Stoic conception of Nature, and measuring thereby the claims for happiness made by the modern spirit they arrive at pessimism and *Weltschmerz*. Schopenhauer was the only thinker who followed that line in Germany. German Romanticism in general derived from its conception of individuality a new principle of reality, of morality, and of history. The decisive factor in this connection was a feeling, half mystical and half metaphysical, which interpreted the idea of individuality as meaning the particular embodiment from time to time assumed by the Divine Spirit, whether in individual persons or in the super-personal organisations of community-life (1) The basis of Reality was regarded as consisting, not in material and social atoms on a footing of equality with one another, or in universal laws of nature by which these atoms were combined, but in personalities constantly moving to different specific forms, and in plastic forces constantly at work on a process of individualisation (2) This in turn resulted in a totally different view of Humanity. Instead of ideas of the equal dignity of Reason everywhere, and of the fulfilment of universal law, we have the conception of a purely personal and unique realisation of the capacities of Mind in every direction, primarily in individual persons, but secondarily also in communities themselves. (3) The result of that conception, in turn, was a different theory of Community Contract and rationally purposive construction were no longer regarded as the factors which created the State and Society out of individuals. The true factors were rather to be found in super-personal spiritual forces, radiating from individuals who laid the foundations of social life;‡ in the National Mind (*Volksgeist*); in the 'Idea' of the Good and the Beautiful. (4) Along with this different idea of Community there goes a different ideal for mankind in general —not the ideal of a final union of fundamentally equal human beings in a rationally organised community of all mankind, but the ideal of a wealth of national minds, all struggling together and all developing thereby their highest spiritual powers; in a word, the ideal of a mirror of God presented by a number of national Minds, all lifted above the world of utility and material welfare. (5) Add these factors together, and you substitute the idea of Development for the old idea of Progress. You abandon a world where men are always seeking, on the basis of equality and by a mere process of incessant climbing, to increase

* '*Jeweils*', which I have translated by the phrase 'from time to time', recurs again and again in Troeltsch's argument It implies a constant genesis, or re-genesis—as opposed to creation once and for all.

† An English reader naturally feels that Wordsworth, who wrote the *Ode to Duty* and *The Happy Warrior*, has here fallen into the wrong company.

‡ Compare Carlyle's teaching in *Heroes and Hero-worship*.

the range of reason, well-being, liberty and purposive organisation, until they attain the goal of the unity of mankind You enter a world in which there is a hierarchy of qualitatively different cultures—a world in which the people that from time to time enjoys the hegemony hands on the torch to the next; a world in which all peoples must be put together, as mutual complements to one another, in order to represent the totality of the life-process (6) The basis of the whole scheme of thought is ultimately a metaphysic in which individuality, plurality and pantheism are combined. It is a metaphysic which stands in sharp contrast to the pantheism of the Stoics, with its monistic trend, its identification of morality with material well-being, its reference of everything to a single law it is a metaphysic which equally stands in contrast to Christian Theism, and also to naturalistic Deism. Here we ultimately come upon the final and deepest difference between Germany and western Europe; and it is a difference which perhaps goes back as far as the days of Master Eckhard and Leibniz *

The general system of ideas we have just described was developed by our classical philosophers and their contemporaries—Hegel and the Historical School; and it was developed on every side, as a new philosophy of nature, history, ethics, aesthetics, religion and politics It is as a philosophy of politics, in particular, that its influence has been most permanently important, both for international relations and in the general divergence of views which it has helped to produce. (1) When the State becomes the embodiment and expression of a particular spiritual world as it exists at a given time, the justice and law it enforces also become particular and positive Law ceases to be a mere non-spiritual product of authority it becomes the peculiar expression—the expression at a given time, conditioned by the circumstances of that time—of a world of ideas engaged in the process of organising itself in an external and legal form. The result of this view is a total and fundamental dissolution of the idea of a universal Natural Law, and henceforth Natural Law disappears almost completely in Germany Law too, like other things, becomes something particular and positive, which only belongs to a given time and period (2) Not only so, but morality proper—morality in the strict sense of the word—becomes altogether a matter of the inner self, in its own particular spiritual substance. The moral code is distinguished not only from the rules of Law, but also from the demands and requirements of social well-being This conception served as a solvent to the combination of law, morality and social well-being which was prevalent in western Europe, and which, indeed, went back through the Middle Ages to Stoicism. It made Law something which lay outside the bounds of morality. (3) In addition, however, to this development, there was also another, which was its

* In other words, it was not, after all, Romanticism and Hegel which first divided Germany from the West: it was the mysticism of Eckhart (A.D 1300), and the philosophy of Leibniz (1700), with its relativism and its doctrine of immanence

converse. This de-moralised Law was associated, in virtue and in consequence of a basic philosophy of Pantheism, with the idea of a spiritual and divine essence inherent in the community.* This meant a deification of the actual particular State; and this deification not only excluded the possibility of any revolutionary impulse, or indeed of any human initiative which was merely a matter of 'personal accident'—it ultimately resulted in the mystical elevation of every State, even the State which was actually as imperfect as it could be, to the position of a sort of deity (4) The whole of this line of argument assumed the inequality of individuals; and this inequality, even if it did not result in the individual being treated as a minor, or divested of his autonomy, involved at any rate the necessity of a system of social grades, social complements, and a social hierarchy. It placed leadership in the hands of great men, from whom the spirit of the Whole essentially radiated, and by whom it was organised. The result was an aristocratic bias and a pyramidal system of graded Estates, utterly repugnant to all the ideas of western Europe about political equality, and only artificially connected with the ideas of organic social unity which the Middle Ages had sought to formulate in Aristotelian terms.† Viewed in its results, the contrast between Germany and western Europe is complete and all-pervading. On the other hand, we have to admit that there is no real difference between them in regard to the value to be assigned to the free personality itself And we must also admit that criticism of German thought, on the ground of its break with historic tradition, can only be properly applied with any rigour after allowance has first been made for the novelty of the German conception of the philosophy of history, as compared with the somewhat mechanical view of history which is connected with the Christian and secular doctrines of Natural Law.

§5 *German idealism and nineteenth-century realism*

It was not fated that this German system of ideas should be given the opportunity of a free and unprejudiced development, in the course of which it could correct and purify its principles by actual trial and experiment. It was only a handful of the great men who belonged to the age of the War of Liberation that could work and think in these terms. There came, after 1815, a return of the old enlightened despotism; and for want of a better object, that despotism was made the legatee of the new system of ideas. The result was a certain narrowing and hardening of the system. Then there arose the necessity, before anything else could

* I e. *Recht* is *Volksrecht*· *Volksrecht* is the product of a *Volksgeist* the *Volksgeist* is an embodiment and 'objectification' of the Eternal Mind. Thus Law is 'associated with the spiritual and divine essence of the community'. Because it is the expression of *mens populi*, and *mens populi* is an expression of *mens Dei*, it attains a sort of divinity.

† The use of Aristotle's theory of 'genesis', proceeding through successive stages or degrees, to foster the idea of a social *Stufenfolge*, is explained in Troeltsch's *Soziallehren der christlichen Kirchen*, pp. 270 sqq.

be done, of constructing from the resources of the German spirit and of German culture a new and united Germany: there came contact and struggle with a new wave of west-European thought: there came the disillusionment of the old belief in spiritual forces, after the collapse of the revolution of 1848. there came, ultimately, the realism of the Bismarckian epoch, engaged in a struggle with a sea of troubles, and seeking to wrest from that struggle the realisation of political unity. The result of all these factors was the conversion of the original idealism into a stern realism. It is true that the fundamental ideas of Romanticism still continued to be held; nor was there any return to the Law of Nature and the ideas with which it was allied. But the conception of a wealth of unique National Minds turns into a feeling of contempt for the idea of Universal Humanity. the old pantheistic deification of the State becomes a blind worship of success and power; the Romantic Revolution sinks into a complacent contentment with things as they are. From the idea of the particular law and right of a given time, men proceed to a merely positive acceptance of the State morality of the spiritual order, transcending bourgeois convention, passes into moral scepticism, and the urgent movement of the German mind towards a political form and embodiment ends merely in the same cult of imperialism which is rampant everywhere. Caught in an obscure welter of motives, thought turned readily in the direction of Darwinism—a philosophy which, distorted from the ideas of its author, was playing havoc with political and moral ideas in western Europe as well as in Germany. Henceforth the political thought of Germany is marked by a curious dualism, which cannot but impress every foreign observer Look at one of its sides, and you will see an abundance of remnants of Romanticism and lofty idealism look at the other, and you will see a realism which goes to the verge of cynicism and of utter indifference to all ideals and all morality; but what you will see above all is an inclination to make an astonishing combination of the two elements—in a word, to brutalise romance, and to romanticise cynicism. One especially dangerous method for the making of such combinations was offered by the later phases of the teaching of Nietzsche In himself, Nietzsche was essentially and thoroughly sympathetic with the very trend of development in German thought of which we have already spoken; but his peculiar combination of romanticism and materialism led none the less to his lending the brilliance of a fine poetic diction to aid the sad confusion into which that trend was falling. By the side of Nietzsche we may also place the philosophy of Marxism, itself a child of the romantic philosophy of history, but a child which attempted to banish the spiritual and moral elements in its parent, and largely borrowed its own ethics (so far as such an element can be attributed to it at all) from the revolutionary theory of Natural Law current in western Europe Bismarck, Nietzsche and Marx—these are the three who, in their different ways, have at once fostered and dissipated the movement of the ideas of romanticism. Fundamentally, however, the stream is still there: it is still a flowing

river; and to-day we can hear once more the great murmur of its waters everywhere.

§6. *Qualifications of the contrast between German thought and the thought of western Europe*

The differences between Germany and western Europe are now clear and intelligible But it is only in a purely theoretical and extreme formulation that they appear to be so clear-cut. In actual life pure theory is never sovereign, and peoples are much more akin in reality than they are bound to appear in the light of theories. What is true of the theories themselves is equally true of their development. Here that development has been sketched entirely as a matter of the logical evolution of principles. In actual life, the growth and development of these theories is inevitably connected with the concrete needs and the active interests of the practical position at the time. The idea of Natural Law itself, in the ancient world, sprang from a strong current towards individualism which was inherent in the actual social life of a universal empire; and each new development of that idea was produced in its turn by the practical necessities of the general conjuncture of affairs in each new phase of history. In the same way, but to an even greater degree, German theories were originally the product of the idealism of a small cultural *élite*, destitute of a State, and therefore intent on the things of the mind; and the changes which they underwent were due to a practical impulse towards their political embodiment, which was itself developed in the course of great European conflicts. It is not a simple matter of two logical alternatives, of which one is adopted here and the other there, and either is then developed on its own basis, with the primary purpose of satisfying the demands of consistency, in order that they may be pitted as rival systems and engage in an opinionated struggle against one another. It is rather a question of systems of thought which are connected with actual situations and actual needs, and which, because they are thus connected with real life, are generally defended not only on grounds of theory, but also, and indeed primarily, on the ground of their practical effects and advantages. This is a point which Bryce explicitly makes in dealing with the thought of western Europe: but the same line of argument is equally, or even more, common in Germany. Here too we find practical arguments used; and here too appeals are made to the actual psychological nature of the nation, the unique character of the historical destinies of Germany, and the difficulties of political geography which she has had to encounter. Paul Joachimsen, in an excellent essay on *The Psychology of the German State*, has recently illustrated this practical method of approach.

Nor must we forget that the differences of which we have spoken are, in the last analysis, less mutually exclusive than they appear at first sight to be. Both systems postulate the idea of the autonomy of man and of personality: both postulate that critical attitude towards experience and tradition which was the product of the Age of Enlightenment. It

is true that this ideal of the autonomous personality is only a sort of common ingredient in two different systems which still remain fundamentally different: it is also true that any attempt to develop this ideal logically involves some difficulties for both. But from our present point of view—which is that of seeking to understand the purely theoretical elaboration of which the contrast between Germany and western Europe is capable, and the actual use which was made of it, for purposes of propaganda, in the Great War—we must forget the practical qualifications of the contrast, and neglect the internal contradictions and limitations in either of the opposing views. So regarded, the two systems confront us purely as systems, and either seeks to vanquish the other as a code of ethics and a school of philosophy. The most definite formulation, the clearest differentiation, are then the methods attempted, with the object of mobilising every moral instinct against the opposing side.

§7. *The problem of modern Germany*

If we would simply understand these differences, we are thus entirely justified in treating them on this ground of pure theory, and in this concentrated form. On the other hand we are bound, as soon as we rise above the immediate objectives of war, to regard any understanding we have attained as simply a preliminary basis, on which our wills can then proceed to adopt an attitude and make a decision in regard to these differences—or even to build a bridge and attempt a reconciliation between them. But the fundamental question to which we naturally come in the last resort is this 'Who is in the right in this conflict of views?' Perhaps we ought to restate the question, and remembering that on this issue, more than on others, it is impossible to be lifted above the strife in a temper of complete dispassionateness, and that each of us is bound, after all, to judge the issue primarily from the point of view of his own nation and its history, we ought to ask, 'To what extent are we perhaps compelled by this conflict to correct our German theories, since it has undeniably dealt them some shrewd blows, on some of their essential points, and since we cannot possibly evade our difficulties by any sort of appeal to Kant and the German Age of Enlightenment?' For a glance at the great main features of our development will teach us, beyond any shadow of doubt, that in all our views of history and politics and ethics we bear the stamp and show the influence of the post-Kantian period, far more than we do of the period of Kant. Indeed it is as clear as anything can be that it was really the post-Kantian age which first revealed the wealth and the depth of the historical approach to reality.

We need not enquire whether such self-analysis and self-criticism can have any effect on the general position of international affairs. That is a separate and independent question; and that field is still predominantly one of conflict and the deliberate fanning of the flames of difference. What we have really to face is a problem which springs from ourselves, and has its roots in our own actual duty of self-analysis, at this

tragic hour of our national destiny and in the stress of the spiritual crisis which it imposes upon us. Our primary concern is not with propaganda and apologetics for the world outside: it is with order and clarity at home, and among ourselves.

§8. *The new historical attitude required*

We can only find a solution of this problem if we apply two standards of judgment We may ask, first of all, whether our theories actually justify themselves by providing a clue to the meaning of history; we may ask, in the second place, how they stand related to the fundamental demands of ethics. Let us attempt, in conclusion, to give the briefest of answers to our final problem, along each of these lines of enquiry. A full answer can only be given after a long effort of investigation by our historical and moral sciences That is the new labour that confronts us; it is the duty laid upon us by the spiritual disturbances which the War has produced. All that can here be attempted is some indication of the main lines on which such an effort must proceed, if ever we are really to solve the grave questions which have been raised by the world-propaganda against us.

Pursuing first the historical line of enquiry, we may fairly urge that German theories, in virtue of the very idea of individuality which has formed their basis, have contributed in a remarkable degree to historical investigation and the understanding of history. They have taught the world the nature of historical thought· they have created the historical sense, as a specific and definite thing. This is the advance which they mark on the historiography of the Age of Enlightenment, and on the later historians who wrote in the spirit of Positivism or *belles lettres*. It is the lesson which we can learn from an English work, by Gooch, on 'Modern Historiography',* though the work does not appear to have evoked any great amount of sympathy in England But this same idea of individuality has also produced some consequences which may well give us pause In its permanent effects it has been altogether disastrous to the conception of universal history It dissolved and disintegrated that conception· it enslaved it to notions of 'relativity'. it transmuted it either into specialisation, buttressed by 'method', or pure national introspection In this respect the tendency of the Age of Enlightenment was something greater and broader,† and this tendency has survived in western Europe to a greater extent than it has with us. Romanticism itself, like contemporary classicism,‡ had been ready enough to think in terms of universal history; but there came a change. The increase of specialist research, the abandonment of the philosophy of history which

* The reference is to *History and Historians in the Nineteenth Century*, by G. P. Gooch, 1913.

† Compare, for example, Gibbon and Giesebrecht—*The Decline and Fall of the Roman Empire* (vol. I, 1776) and *Die deutsche Kaiserzeit* (vol I, 1855)

‡ E.g the 'classicism' of Winckelmann's work on Greek Art and Wolf's *Prolegomena to Homer* (circiter 1770–95).

had once held sway; the complete detachment from any sort of philosophy in a school of research which sought the particular, and immersed itself, either from *parti pris* or under the weight of learning, in pure detail—all these causes turned most of our historiography into the paths of materialism or complete relativity.

What was needed, in the face of such a development, was a return to a way of thinking, and a way of feeling about life, which was not merely 'historical', but 'universal-historical'. It will be one of the great tasks of the future to attain such a way of thinking and feeling We may even say that thought and feeling of this nature are always essentially present wherever there is an impulse towards history, and they can only be repressed by the pressure of special circumstances But if you want universal history, you must have some notion of the future and its goal;* for only in the light of such a notion can the record of man be drawn together into a unity. How far that is possible, and in what sense it is possible, is one of the great burning questions of the day. The attitude towards history which is merely specialist, or for that matter merely contemplative, has to be transcended: the image of Clio has to be made to face, once more, towards the great and universal problems of the future. The rigour, the width of equipment, and the devotion of research into what has happened (*Gewesenes*),† must be combined with the will that acts and shapes the future; and this active will of the historian must not only penetrate into the being of his own particular nation, but it must also rise to a view of the being of that nation as connected with the being and the development of the whole World. Here again western Europe has certainly preserved, at any rate among some of its representatives, a greater degree of active vigour and practical sense.

Last of all, and most of all, the problem of attaining a harmony of culture in our generation requires us to pay a much greater regard to the great world-forces in politics and ethics which dominated the nineteenth century, and primarily to the developments which sprang from Natural Law and the idea of Humanity These developments will, and must, play their part in determining the ideal which must underlie any future harmony of civilisation; and they will do so because they are inextricably connected with a certain intellectual maturity, a certain stage in the increase of population, and certain religious and philosophical elements in our modern phase of civilisation They will also have a decisive influence on what we actually are, as well as on our ideals of what we should be. These are matters which have indubitably been neglected by our German historiography, or at any rate treated with an ill-advised antipathy, which astonishingly combines an exaggerated romanticism with a habit of reliance on Prussian militarism for the support of law and order. A change is possible without any rejection of the essence of German ideas: on the contrary, a change would

* 'True history', we may say, 'is teleological history'.

† Compare Ranke's saying about History, in the preface to his first work, *Er will bloss zeigen wie es eigentlich gewesen.*

only mean a return, in many respects, to an earlier, broader and more candid treatment of history. It would also restore a new contact with the thought of western Europe, at a number of points on which there was once a large measure of agreement between it and our own classico-romantic age (1770–1800), and on one point in particular—that of the so-called 'Rights of Man'—it would aid us in correcting a certain one-sidedness, which was already fraught with serious consequences in that age, and is even more serious to-day in view of the universal diffusion of Western ideas which has since ensued. But we need not, in changing our attitude, forego altogether any criticism of the ideas to which we turn—the less, as such criticism is already being applied to them at many points in western Europe itself, where it is generally current in the form, not indeed of Marxian Socialism, but at any rate of socialistic ideas. We may even say that the best elements of German thought have in many respects a close affinity with such criticism, so far as it is directed to something more than economic interests and struggles, and so far as it has regard to problems of spiritual life and the deeper foundations of social well-beir

§9 *The new ethical attitude required*

When we turn to our second, or ethical, line of enquiry, we have to begin by insisting once more on a fact to which we have already referred. If the classico-romantic spirit is closely connected with German historical thought, it also marks an extraordinary advance, if we look at its general tendency towards a free, personal, and individual ethic.* In order to feel the aesthetic invigoration and emancipation which such an idea of morality can inspire, we must read the Edinburgh Rectorial Address in which Mill expressed his desire that something of the spirit of Humboldt might fall on the 'gentleman' trained by Puritanism and business†—a suggestion afterwards rejected by Herbert Spencer, as derogatory to the natural sciences and empirical observation. An ideal such as that of Humboldt is indeed a real emancipation, when we set it over against ideas of morality which are simply those of a religious confession, or of middle-class convention and social position, or of bare and abstract rationalism. The same is true of the organic conception of the community which is connected with such an ideal. The conception that a community has a unity of life, pervading its different parts, which is directed to the well-being of the whole and determined by the individuality of the whole, is surely something richer and more living, from a purely ethical point of view, than any conception of 'contracts' and 'controls' intended to secure a common diffusion of prosperity.

* Because it starts from the conception of individuality (p. 211 supra), and because it postulates the idea of the autonomy of man and of personality (p. 215).

† In the *Essay on Liberty* also, c. III, Mill cites Humboldt's *Sphere and Duties of Government*, and states, as a theory of which 'few persons, out of Germany, even comprehend the meaning', his ideal of individuality of power and development.

And it provides as surely, from the same ethical point of view, a higher principle of conduct than the opposing idea of Equality, which always tends to result in a tangle of radical contradictions, or else in banal superficialities.

Yet when all is said, the moral philosophy of Romanticism has its defects. The idea which it presupposes, and yet only allows to emerge in one particular form—the idea of the fundamental personal liability, the responsibility, the autonomy of Personality—is one which ought to have been given a very much greater prominence than it ever received in Germany, especially in the later transformations and political perversions of the spirit of Romanticism. The theory of the Rights of Man—rights which are not the gift of the State, but the ideal postulates of the State, and indeed of Society itself, in all its forms—is a theory which contains so much of the truth, and satisfies so many of the requirements of a true European attitude, that we cannot afford to neglect it; on the contrary, we must incorporate it into our own ideas. The same is true of the theory of Associations, as possessing their own individual unity of life, which has now become so important a factor in our view of Society and the State.* We must not allow that view to be petrified by tradition and custom and national self-esteem. we must not allow it to leave out of account other States and peoples and communities, or the need of an ordered system of relations with them. The wider horizon of 'the parliament of man and the federation of the world' must include all the elements of which we have spoken, as moral necessities and postulates; and while we recognise the obstacles which actually confront these postulates, we must none the less cling to them as our ideal. At the heart of all the current ideas about a League of Nations, the organisation of the world, and the limitation of egoisms and forces of destruction, there is an indestructible moral core, which we cannot in its essence reject, even if we are painfully aware, at the moment, of the difficulties which it presents and the abuse to which it is liable. We may see the difficulties and the abuse clearly we may seek, with all our strength, to overcome them, but what we cannot do, and must not do, is to deny the ideal itself in its own essence, in its ethical significance, in its connection with the philosophy of history.

§ 10. *Spenglerism and Socialism*

We have sketched a programme of self-analysis for the historical, political and ethical thought of Germany; but it is no more than a mere indication of the directions along which the effort has to be made. Such a programme can only be achieved by the labour of generations, and by the gradual formation of a common resolve, among our leading

* Troeltsch is contending that just as German thinkers ought to give a deeper sense, and a wider scope, to the idea of individual personality which Romanticism implied, so they ought to generalise (and not confine to Germany) the idea of Group-personality which it also assumed.

thinkers, to work together for its realisation. We are not required to retrace the whole of the path we have trod, or to renounce the quality of our national spirit: we are only asked to recover ideas which we have allowed ourselves to lose, and to develop and adapt the thought of our stock to the vastly altered condition of the modern world. At the moment we are still very far from being of one mind in regard to the assumptions on which we ought to proceed. When we look at a book such as Spengler's *Decay of Civilisation*, which is fundamentally inspired by Nietzsche, and reflect on the enormous impression which it has made, we have to admit that the current is flowing in the opposite direction to that which has just been suggested. It is encouraging men to formulate, in their extremest form, all the deductions which can be drawn from Romantic aestheticism and Romantic ideas of individuality to foster the cause of scepticism, of amoralism, of pessimism, of belief in the policy of force, of simple cynicism. 'Decay' is indeed a consequence which follows logically on such a basis; for with such ideas in their minds men simply cannot exist, or fight the battle of the future. Spengler's book is an absolute confirmation of the reproaches which western Europe brings against us it is nothing less than a hauling down of the flag of life in the course of man's perpetual struggle to keep it flying. He who desires to survive—and our nation *does* desire to survive—can never go that way. Our duty to our German traditions is not to push them to an extreme and one-sided conclusion—surrendering, in the process, the relative merit of strict and scholarly accuracy which they possess—but to bring them into new contact with all the great movements in the world about us

But it would also be an error, and an error in the reverse direction, to believe that socialist theory, and the socialist interpretation of history, are on the right track It is true that the German theory of Socialism, in its Marxian form, is a combination of elements It unites a theory of history which was formed by Romantic philosophy, and which makes history a process of constant individualisation, with the principles of a democratic and humanitarian cosmopolitanism. The first of these elements is responsible for anything which Socialism can offer in the way of a realistic view of history and evolution, or of spiritual suggestion and constructive social power: the second is the source of the whole of its gospel of world-revolution, world-salvation, the cause of Humanity, the universal organisation of all mankind. But if Socialism is a combination of elements, it is a defective combination. The first of its elements has been utterly desiccated by a barren economic materialism, and the atheism which goes along with it, and the union between its two elements is so external, and so artificial, that they are continually breaking apart. Socialism is a compound which is always dissolving into its component parts—a rigorously determinist idea of evolution, altogether barren of controlling ideas; and a totally unhistorical passion for revolution, to be achieved in the name of Humanity and Equality. When the socialist feels that he must enunciate principles, he naturally

lays his emphasis entirely, or almost entirely, on the second of these factors. When that happens, socialistic principles become practically indistinguishable, in spite of the Socialist challenge to the bourgeoisie, from the bourgeois philosophy of the West; and the individualistic and utilitarian basis of that philosophy, in particular, is simply adopted wholesale. The distinction between German Socialists and the peoples of western Europe is thus practically reduced to the fact that the latter, with the proud confidence of great nations, feel themselves to be representatives of great national positions of leadership, while the former simply follow in their wake, failing to bring their own nation into any touch with the problems of the future, and failing equally, as a result, to pay any real attention to the peculiar political conditions of its life.

Neither the doctrines of Spengler nor the doctrines of Socialism are the new gospel that we need. They are rather the Scylla and Charybdis between which we must steer our course. We must make for the open sea of fresh, unprejudiced, far-seeing thought upon all these issues, remembering that, if they are in themselves the oldest objects of human action and human thought, the answers they ask for from us to-day are new.

APPENDIX II

GIERKE'S CONCEPTION OF LAW*

The development of natural-law ideas in regard to the relation of the State to Law attained its culmination at the end of the eighteenth century. After that time we can begin to trace a process of collapse and disintegration in the whole of the natural-law system of thought.

In Germany the theory of Natural Law disappears before the new world of ideas introduced by the Historical School. It was the achievement of that School to transcend, at last, the old dichotomy of Law into Natural and Positive. Regarding Law as a unity, and conceiving it as the positive result and living expression of the common consciousness of an organic community, the thinkers of the Historical School refused to content themselves with merely continuing to emphasise one or the other side of the old antithesis they sought and achieved a synthesis of both in a higher unity. The factors which determined their conception of the relation of the State to Law were factors equally derived from the Natural and the Positive Law of the older doctrine. In the new view which they attained, Law ceased to be regarded as partly anterior and superior to the State, and partly produced by and inferior to it Law and the State were held to be so intertwined that they were regarded as coeval with one another; as intended to supplement one another; as dependent upon one another.

The philosophical elaboration of this idea has not yet been fully achieved. Meanwhile there has been an abundance of criticism, from all sorts of quarters, some of it devoted to discovering the errors of the Historical School, and some of it even to calling in question again the very foundations of the historical view of Law. So far as the problem of the relation between Law and the State is concerned, we can detect in the chaos of modern opinion two particular currents of thought, opposed to one another, but united together in opposition to the historic-organic idea of Law. On the one hand, there has been a period during which conceptions of an abstract Law of Nature pressed once more to the front, and menaced the very idea of the State. On the other hand, there is now a current of thought, which is gradually gaining volume in Germany,† that threatens to undermine all the foundations of Law. It recurs to the old ideas of Positive Law, but it abandons the notion of Natural Law which used to be the complement of those ideas. In this last and newest way of approach, the idea of Law ultimately vanishes altogether. So far as its content or substance goes, it is en-

* Translated from his *Johannes Althusius*, Part II, c. VI, §III.

† These words were originally written about 1880 They are repeated in the later edition

gulfed in the idea of Utility; so far as its power or efficacy is concerned, it is engulfed in the idea of Force. If this way of approach should prove victorious, the only merit of the Historical School will have been its rejection of Natural Law; and the ideas of Natural Law, reduced to an idle play of the human imagination, will have pursued in vain their many centuries of evolution.

But if there is to be a true Law in the future—a Law which is not a mere *décor* of traditional well-sounding names, but the genuine expression of a specific, unique and intrinsically valuable idea of the mind of man—a different historical perspective reveals itself to our eyes. In that perspective, we can see that the idea of Law has won real and permanent conquests from the development of Natural Law; we can see that the Historical point of view, far from surrendering those conquests, has only generalised and diffused them; and we may confidently believe that these conquests will never be lost in the future, whatever changes or improvements may be made in men's conceptions of Law. On such a view the sovereign independence of the idea of Justice, secured before by the old conception of Natural Law, will still continue to be firmly secured by our new conception of Law as something thoroughly positive—no matter whether the idea which opposes that conception be the idea of social utility, or the idea of collective power.*

If Natural and Positive Law thus coincide in their essence, the relation of Law and the State will no longer be conceived in two opposite ways, as it was in the older theory; and the ideas which found expression in opposite points of view may now be united in one We shall no longer ask whether the State is prior to Law, or Law is prior to the State. We shall regard them both as inherent functions of the common life which is inseparable from the idea of man They will both be primordial facts: they will both have been given, as seeds or germs, coevally with man himself they will both appear, as developed fruits, simultaneously with one another and in virtue of one another. We shall regard the State, and all other organised forms of collective power, as no mere product of Law; but we shall hold that every form of power, from the lowest to the highest, can only enjoy a sanction, and receive its consummation, when it is stamped and confirmed by Law as being a legal power. Conversely, we shall regard all Law as needing the sanction and consummation of power; but we shall not count the State, nor any other human power, as the maker and creator of Law.

Law, which is, in its essence, a body of external standards for the action of *free* wills, cannot itself be made of the substance of will; for if will is made the standard for wills, the logically inevitable result must always be that will turns itself into power. If there is to be an obligatory external standard for the action of will *in general*, and not merely for the action of this or that *particular* will, such a standard must be

* 'Social utility' and 'collective power' seem to represent the creeds of Socialism and Radical Democracy.

rooted and grounded in a spiritual force which confronts the will as something independent. That force is Reason. It follows that Law is not a common will that a thing shall be, but a common conviction that it is. Law is the conviction of a human community, either manifested directly by usage or declared by a common organ appointed for that purpose, that there exist in that community external standards of will —in other words, limitations of liberty which are externally obligatory, and therefore, by their very nature, enforceable.

It is true that the State, in its capacity of legislator, not only shows itself active, over a large and important field, as the 'bearer' and the corroborator of this conviction of Right (or Law), but also consummates every development of such conviction (1) by the issue of a command and (2) by the use of compulsion But (1) the action of the common will in commanding obedience to what *is* Law is not an action which *creates* Law. it is only an action which sanctions Law. Similarly, (2) the fact that a supreme power is needed, in order to realise fully the compulsoriness demanded by the nature of Law, does not prevent Law from still being Law even though, in a particular case, compulsion is lacking, or can only be imperfectly applied, or is altogether impossible for want of a higher power which is capable of using it—provided only there really is a common conviction that compulsion would be right if it were possible, or if a competent authority were in existence

On this basis, we may, indeed, hold that the State is more than a legal institution, and exists for more than the purpose of Law, but we shall also hold that the purpose of Law is pre-eminent among all the purposes of the State's existence—just because the full consummation of Law requires the presence of a sovereign power—and we shall therefore regard the legal purpose of the State as its essential purpose, which cannot for a moment be abstracted from our idea of its nature. Conversely, we may, indeed, regard Law as intended primarily to serve the purposes of the State's life; but we shall also consider its objects as far from being exhausted by, or limited to, such service There is indeed one admission which we shall have to make on such a view. If we place the State neither above Law, nor outside it, but *in* it, thus confining the liberty of the State within the bounds of the system of Law. if, again, we set Law neither above the State, nor outside it, but *in* it, thus allowing the formal omnipotence of the sovereign authority to assert itself even against Law—then there will be a possibility of contradiction between the Matter and the Form of Law*, the actual and the ideal. But to deny the possibility of such a contradiction is to deny the very idea of Law.

A deep element in the spiritual nature of man longs for the union of Law and Power—of Right and Might. Division between them is always

* The Matter is what is actually expressed by the sovereign authority in its enactment. the Form is the ideal of Right which ought to shape and control such enactment.

felt to be something wrong. This feeling is the best evidence that Law may exist without Power, and Power may exist without Law. But it is also the source of a healing and reconciling influence, which is always tending to bring us back to a unity of Right and Might. The human conscience cannot permanently endure the separation of the two. Right which cannot establish itself vanishes at last from the common conscience, and thereby ceases to be Right. Might which exists without Right, if it succeeds in maintaining itself, is felt at last by the general conscience to exist as of right, and is thus transformed into Right.

In a note appended to later editions Gierke adds.

The statement of the author's own views on the relations of Law and the State, and his animadversions on the Power and Utility theories, make the concluding remarks of this chapter depart from the spirit of historical analysis to a greater degree than the occasional remarks at the end of the previous chapters of this work. This may appear to be open to criticism The author would plead in excuse that he was dealing with a matter which lay close to his heart....I still live to-day in the conviction that our legal theory and our legal life can only thrive on one condition—that 'positivism' should somehow learn to preserve for the idea of Law that original and independent title to existence which was vindicated for it by the School of Natural Law. I regard as mistaken all the attempts to resuscitate Natural Law into a bodily existence, which can only be the existence of a simulacrum. But the undying spirit of that Law can never be extinguished If it is denied entry into the body of positive law, it flutters about the room like a ghost, and threatens to turn into a vampire which sucks the blood from the body of Law. We have to accept together both the external experience which testifies that all valid Law is positive, and the internal experience which affirms that the living force of Law is derived from an idea of Right which is innate in humanity, and when we have done that, we have to blend the two experiences in one generic conception of the essential nature of Law. The method of achieving this object is a matter on which agreement cannot so easily be found. But many who seek to attain it by other means will agree with me about the end which we have to attain.